Supreme Court, U.S.
FILED
051076 FEB 17 2006
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No. 05-___

In The

# Supreme Court of the United States

KEVIN Y. PADOT,

*Petitioner,*

v.

BRENDA G. PADOT,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Second District Court Of Appeal Of Florida**

## PETITION FOR WRIT OF CERTIORARI

DAVID J. BEDERMAN
*Counsel of Record*
1301 Clifton Road
Atlanta, Georgia 30322-2770
(404) 727-6822

*Attorney for Petitioner*

## QUESTION PRESENTED FOR REVIEW

Where a veteran has elected to take military disability pay in lieu of retired pay, may state courts, in contravention of federal statutes, 10 U.S.C. 1408 and 38 U.S.C. 5301, and this Court's ruling in *Mansell v. Mansell*, 490 U.S. 581 (1989), nonetheless require former servicemembers to remit to former spouses a part of that foregone pay, even without an indemnification provision in the divorce property settlement?

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## PETITION FOR WRIT OF CERTIORARI

Petitioner, Kevin Y. Padot, respectfully prays that a writ of certiorari issue to review the December 15, 2004, judgment and opinion of the Second District Court of Appeal of Florida in the above-captioned proceeding.

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## OPINIONS BELOW

Petitioner seeks review of the opinion and judgment of the Florida Second District Court of Appeal of December 15, 2004, styled as *Padot v. Padot* (Docket Nos. 2D03-1011 & 2D03-3843), and reported at 891 So. 2d 1079 (Fla. Dist. Ct. App. Dec. 15, 2004), and reprinted at App. 1a. The Florida District Court of Appeal's decision came as an appeal of an Order issued by the Circuit Court of Pinellas County, Florida, of November 12, 2002, which was unreported, but is reprinted at App. 16a, confirmed on motion for rehearing on January 22, 2003. See App. 21a.

## STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the Florida District Court of Appeal of December 15, 2004. The Florida Supreme Court denied review of that decision on October 3, 2005. See App. 15a.

On December 21, 2005, an Application to extend the time to file a Petition for Certiorari in this case from January 1, 2006, to February 24, 2006, was filed. Such Application was granted by Justice Kennedy on December 28, 2005.

The U.S. Supreme Court has jurisdiction to review cases from state courts by virtue of 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Petition implicates the power of states to override provisions of acts of Congress, in contravention of the Supremacy Clause of Article VI of the federal Constitution. See U.S. CONST. Art. VI, cl. 2 ("The Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

The federal statutes specifically at issue in this case are the Uniformed Services Former Spouses' Protection Act (USFSPA), codified at 10 U.S.C. § 1408, the relevant provisions of which are reprinted at App. 24a, as well as the nonattachment and exempt status provisions of the Veterans' Benefits Act (VBA), codified at 38 U.S.C. § 5301, reprinted at App. 32a.

## STATEMENT

1. a. In exercise of its powers under the Constitution, U.S. CONST. art. I, § 8, cls. 12 (Raise and Support Armies Clause) & 14 (Regulation of Armed Forces Clause), Congress has prescribed a wide array of benefits to the men and women who have served with honor in the United States armed forces. Among these benefits are the retired and retention pay that is rendered to enlisted personnel and officers who serve a statutorily-prescribed period of time on active duty (typically 20 years), and (though retired) are still obliged to comport themselves in accordance with the Uniform Code of Military Justice and are subject to recall for active duty. See 10 U.S.C. §§ 1401 et seq.

Analytically distinct from retired or retention pay are veterans' disability benefits, including disability pay, which is

offered those former service members (separated from active duty or retired) who have been found by the Veterans Administration to have actually accrued service-related disabilities. See 38 U.S.C. §§ 1101, 1110, 1131 et seq. Up until very recently,[1] a veteran who was eligible for both retired pay and disability compensation was required to elect one or the other. See 10 U.S.C. § 1414; 38 U.S.C. § 5305. Since disability pay, unlike retired pay, is not subject to federal income tax, see 38 U.S.C. § 5301(a)(1); App. 32a, veterans have tended to select the receipt of disability pay.

b. Up until the early 1980's it was a matter of some controversy whether military retired pay was even divisible as a community asset in divorce proceedings involving a former member of the armed forces. In a 1981 decision, this Court in *McCarty v. McCarty*, 453 U.S. 210 (1981), ruled that federal law precluded state courts from dividing military nondisability retired pay pursuant to state community property laws. See id. at 235. This Court made clear in *McCarty* that disability compensation was an entirely different benefit, although subject to the same rules of federal preemption. See id. at 213.

In response to *McCarty*, Congress legislated in 1982 the Uniformed Services Former Spouses' Protection Act (USFSPA), codified at 10 U.S.C. § 1408; App. 24a. For the purposes of the present Petition, the crucial provisions of USFSPA concern

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[1] See National Defense Authorization Act, 2004, Pub. L. No. 108-136, § 641, 117 Stat. 1392 (2003), which allows a phase-in of full concurrent receipt of military retired pay and veterans disability compensation for certain military retirees (those whose disability rating exceed 50% and satisfy other eligibility criterion). This possibility of concurrent receipts of retirement pay and disability compensation is not otherwise at issue in this case.

Congress's grant to state courts of the authority to treat retired pay as property "solely of the [service] member or as property of the member and his spouse in accordance with the law of the jurisdiction. . . ." See 10 U.S.C. § 1408(c)(1); App. 26a. USFSPA by no means required states to treat military retired pay as divisible property, but merely allowed them to do so without any federal preemptive effect, should state community property or divorce settlement laws so prescribe.[2] In any event, Congress took care in USFSPA to define what "disposable retired pay," id., was subject to division with a former spouse. Among the amounts required to be deducted from total retired pay, in order to calculate disposable retired pay, are any amounts that a veteran was obliged to waive as a condition of receiving disability compensation. See 10 U.S.C. § 1408(a)(4)(B); App. 26a.

An additional feature of USFSPA was an automatic payment procedure by which former spouses could directly receive court-ordered increments or shares of a veteran's retired pay, provided that certain statutory requisites were satisfied by the former spouse. See 10 U.S.C. § 1408(d). In addition, Congress imposed a percentage cap on amounts of a veteran's retired pay that could be directly remitted under this scheme. See 10 U.S.C.

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[2] Community property states had traditionally sought to include military retired pay as a marital asset. After USFSPA, most, but not all, of remaining states have, in fact, adopted statutory or common law rules of construction allowing the treatment of military retired pay as a marital asset subject to division upon divorce. See A Report to Congress Concerning Federal Former Spouse Protection Laws, Sept. 4, 2001, Appendix C, available at http://www.dod.mil/prhome/spouserev.html (visited Feb. 3, 2006) [hereinafter "DoD 2001 USFSPA Report"]. This Report was prepared in accordance with the congressional mandate of the National Defense Authorization Act, FY 1998, § 643, Pub. L. 105-85, 111 Stat. 1629 (1997).

§ 1408(e)(1); App. 28a. Congress also prescribed a carefully-constructed savings clause to govern situations where state courts ordered remissions of retired pay in excess of the statutory caps applicable to the automatic pay scheme:

> Nothing in this section shall be construed to relieve a [service] member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid. . . .

10 U.S.C. § 1408(e)(6); App. 30a.

c. Any hopes that the enactment of USFSPA would conclusively and completely resolve the status of veterans' retired pay as marital property subject to division at divorce were quickly dashed. Indeed, state courts quickly proved their aptitude in evading USFSPA's restrictions in order to settle additional benefits on the former spouses of service members. Indeed, this Court was obliged in 1989, in *Mansell v. Mansell*, to address virtually the precise issue raised in this Petition: whether state courts "may treat as property divisible upon divorce military retirement pay waived by the retiree in order to receive veterans' disability benefits." 490 U.S. 581, 583 (1989). Writing for a majority of the Court (with O'Connor and Blackmun, JJ., dissenting), Justice Marshall concluded that "they may not." Id.

The *Mansell* Court was faced with a state court divorce decree and property settlement that was much more ambiguous than the one presented here: Major Gerald Mansell agreed, at the time of his divorce, that his former wife, Gaye Mansell, would receive "50 percent of his total military retirement pay, including that portion of retirement pay waived so that [he] could receive disability payments." Id. at 586. Four years later, Major Mansell requested a modification of his divorce decree by removing the provision requiring him to share his total retired pay with his former spouse. Id. California courts denied his motion, despite his challenge that such a ruling conflicted with both USFSPA and the anti-attachment provision of the Veterans' Benefits Act (at the time of the *Mansell* decision, codified at 38 U.S.C. § 3101(a), and now at id. § 5301(a); App. 32a).

Basing its holding on USFSPA, and declining to reach the nonattachment statute as an independent ground, 490 U.S. at 581 n.6, this Court held that USFSPA specifically preempted a state court's attempt to treat disability pay as a part of a veterans' disposable retired pay, subject to division as part of marital property under that statute. See id. at 588-90 (construing 10 U.S.C. § 1408(a)(4)(B); App. 26a, and id. § 1408(e)(6); App. 30a). The Court reached this conclusion, even as it acknowledged that "Congress, when it passes general legislation, rarely intends to displace state authority" over family law issues, and that this Court "will not find preemption absent evidence that it is '"positively required by direct enactment"'." Id. at 587 (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979), and citing *Rose v. Rose*, 481 U.S. 619, 628 (1987)). Indeed, the *Mansell* Court concluded that "[t]he instant case, however, presents one of those rare instances where Congress has directly and specially legislated in the area of domestic relations." Id.

And, unlike the situation in the wake of this Court's decision in *McCarty*, Congress appears to have acquiesced in this

Court's construction of USFSPA to the effect that amounts owing to a veteran as disability pay are not subject to being divisible as marital property upon divorce. Despite the fact that Congress has amended USFSPA no less than eight times after the *Mansell* decision was rendered, see App. 31a, in no instance has Congress chosen to disturb that ruling or to otherwise amend the statute in a way material to the issues raised in this Petition. As will be discussed presently, however, state courts have not been so respectful of this Court's ruling in *Mansell*, necessitating this Petition and this Court's intervention.

2. a. Petitioner, Kevin Y. Padot, married Respondent, Brenda G. Padot, on September 6, 1980. In a Final Judgment, issued by the Circuit Court for Bay County, Florida, on February 1, 1995, they were divorced. See App. 2a. In that Judgment, the court specifically reserved jurisdiction to determine the equitable division of marital assets and liabilities. See id.

In a Supplemental Order of March 17, 1995, the Florida Circuit Court divided Petitioner's military retired pay with his former spouse. See id. Kevin Padot served in the U.S. Air Force from April 1980 until May 2000. At the time of his divorce, he was still on active duty in the armed forces, needing six more years of service to become statutorily eligible to draw retired pay upon his separation from his service. See App. 16a-17a.

The Florida Circuit Court nevertheless awarded Respondent a percentage of Mr. Padot's retired pay, as property, if and when he began receiving it. See id. The Supplemental Order contained a provision to the effect that "[n]either party shall take any action which shall alter or otherwise reduce the interest of the other party in the retainer pay, retired pay, deferred compensation, or other military benefit." Id. (quoting ¶ 2(b)(11) of the Order). The Supplemental Order did not, however, value the retirement pay nor contain an indemnification provision which

required Mr. Padot to compensate Respondent, in the event that his military retired pay was reduced for whatever reason. See App. 7a-8a. Nor did the Supplemental Order award Respondent with a sum certain to be paid by Mr. Padot from his retired pay, or incorporate by reference a property settlement agreement concluded by the parties. See id. Finally, nothing in the Order mentioned the disposition of Petitioner's disability pay, in the event he received any. The Order did give the Florida Circuit Court continued jurisdiction "to enforce the former spouse's rights to her share of the above-described benefits." App. 8a (quoting ¶ 2(b)(16) of the Order).

Mr. Padot retired from the Air Force on May 1, 2000, at the rank of E-6 (Technical Sergeant) and received his first military retirement pay in June 2000. See App. 2a. As part of the retirement process, Mr. Padot sought review of his medical records and received a 30% disability rating from the U.S. Veterans Administration. See id. As a consequence, Petitioner, in December 2000, was required by law to waive 30% of his retired pay in order to receive an equal amount of non-taxable disability pay. See id. After a period of underemployment, in April 2001, Mr. Padot was hired by the federal government as a civilian air-traffic controller, a position he had held during his military service. See App. 2a-3a, 17a.

b. Because Mr. Padot's retirement pay was reduced by his disability rating and election to take disability pay, his former wife's share of retirement pay as property was likewise diminished. In July 2002, Respondent filed a motion in Pinellas County Circuit Court to enforce the 1995 Final Judgment and Supplemental Order, claiming that Mr. Padot's waiver of retired pay in preference for disability pay, was a violation of the court's orders, as was an election taken in regard to Petitioner's military survivor benefit plan. See App. 3a. (That second issue is not before this Court.)

In a November 12, 2002, Order, see App. 16a, the Florida Circuit Court ruled that Mr. Padot was required to reimburse Respondent for her share of the lost retired pay he had waived as a result of receiving disability pay. See App. 18a-20a. The Circuit Court acknowledged the apparent tension between Florida's jurisprudence on this subject, and this Court's ruling in *Mansell v. Mansell*, 490 U.S. 581 (1989), see App. 17a-18a, but ruled that the equities of the situation (including the fact that Petitioner had a source of income other than his retired and disability pay) required that he reimburse his former wife, even though the divorce decree did not require that he indemnify her in these circumstances. See App. 18a-20a.

In response to a motion for reconsideration, the Florida Circuit Court confirmed, see App. 21a, that it understood the controlling authority to be the Florida Supreme Court's decision in *Abernethy v. Fishkin*, 699 So.2d 235 (Fla. 1997), and not this Court's earlier ruling in *Mansell*. Rehearing as to the division of military retired pay was thus denied. See id.

c. On appeal, the Florida Second District Court of Appeal affirmed with respect to this ruling on military retired and disability pay. See App. 3a-9a, 13a. The Florida Court of Appeal held, consistent with the trial court's judgment, that this Court's ruling in *Mansell* was distinguishable to the circumstances here, because Mr. Padot was still on active duty at the time of his divorce and had (at least currently) a source of income aside from the receipt of military retired or disability pay. See App. 4a-6a.

The Florida Court of Appeal went on to hold that the Florida Supreme Court's decision in *Abernethy* was controlling, even though in that case the divorce decree required the former servicemember to indemnify his ex-spouse in the event that he reduced his military retired pay by electing to take disability pay

in its stead. See App. 7a. The Florida Court of Appeal, relying on Tennessee case law, see App. 8a-9a (quoting *Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001)), ruled that Petitioner's agreement to "take [no] action which shall alter or otherwise reduce the interest of the other party in the . . . retired pay," was tantamount to an indemnification promise and that Florida courts have the equitable power to ensure that former spouses receive, as a "vested interest," a percentage of all of the military retired pay that was due them. See App. 9a.

d. Discretionary review in the Florida Supreme Court was sought by Petitioner for this aspect of the Florida Court of Appeal's ruling. Review was denied on October 3, 2005. App. 15a. This timely Petition (in light of Justice Kennedy's December 28, 2005, grant of an application extending the time for filing) follows.

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## REASONS FOR GRANTING THE PETITION

### STATE COURTS ARE SHARPLY DIVIDED AS TO THE PROPER TREATMENT OF VETERANS' DISABILITY PAY, TAKEN IN LIEU OF MILITARY RETIRED PAY, IN DIVORCE DECREES

This Petition calls for the Court to reconsider the nettlesome connection between federal statutes governing the disposition of federal veterans' benefits and the traditional authority of state courts over the making and enforcement of property decrees arising from divorce. This issue has required the Court's attention on a number of occasions in the last quarter-

century, see, e.g., *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979); *McCarty v. McCarty*, 453 U.S. 210 (1981); *Rose v. Rose*, 481 U.S. 619 (1987); and *Mansell v. Mansell*, 490 U.S. 581 (1989).

It requires this Court's review now because state supreme courts and appellate courts are in manifest division as to the proper construction of the relevant federal statutes involved here – the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408; App. 24a, and the nonattachment provision of the Veterans' Benefits Act (VBA), 38 U.S.C. § 5301; App. 32a. In addition, state courts – including the Florida Court of Appeal in the decision for which review is sought here; see App. 3a-9a – are clearly unsettled as to the preemptive effect that federal benefits statutes should have on the enforcement of state law divorce property decrees. Finally, many state courts appear to be either in open defiance of this Court's earlier rulings in *Mansell* and *McCarty*, or (at a minimum) striving mightily to develop untenable and problematic ways to distinguish this Court's holding that USFSPA preempts state laws that have the effect of devolving on a former spouse funds that are attributable to a veteran's receipt of disability pay. See 490 U.S. at 583, 594-95.

1. This Petition essentially asks the Court to resolve a number of matters left outstanding from its previous decisions in *Mansell* and *McCarty*.

a. As already discussed, this Court's ruling in *Mansell* settled the question of whether a veterans' disability benefits could be divided under state law community property theories. See 490 U.S. at 586 n.6 ("we decide that the Former Spouses' Protection Act precludes States from treating as community property retirement pay waived to receive veterans' disability benefits. . . ."). But this Court appeared to leave open

the question of whether a state court could justify a division of veterans' disability pay on other grounds. In an enigmatic footnote, this Court noted:

> In a supplemental brief, Mrs. Mansell argues that the doctrine of res judicata should have prevented this pre-*McCarty* property settlement from being reopened. The California Court of Appeal, however, decided that it was appropriate, under California law, to reopen the settlement and reach the federal question. Whether the doctrine of res judicata, as applied in California, should have barred the reopening of pre-*McCarty* settlements is a matter of state law over which we have no jurisdiction. The federal question is therefore properly before us.

490 U.S. at 586 n.5.[3] As will be shown presently, many state courts have seized on this language to create a "res judicata" exception to USFSPA's bar on state courts allocating, in a divorce decree, disability pay as part of a veteran's retired pay.

Reduced to its essentials, the holding in *Mansell* is that when no prior order and no prior agreement exists, federal law requires that disability benefits be awarded to the owning spouse, and state law to the contrary is preempted. The issue presented here is whether a state court may construe a divorce decree that does not even mention disability pay, and that does not purport to indemnify a former spouse for an election of

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[3] Nor is there any doubt that a federal question is properly before the Court in this case. The Florida Appeal Court clearly relied upon (or at least sought to distinguish) federal law as the basis of its decision, see App. 4a-6a, and did not expressly invoke state law res judicata grounds for its holding.

disability pay in lieu of retired pay, as nonetheless being an equitable agreement to pay such benefits, despite the contrary provisions of federal law.

b. The relevant federal law is not only the applicable provisions of USFSPA, which formed the basis of this Court's holding in *Mansell*, but also the anti-attachment clauses of the Veterans' Benefits Act (VBA), 38 U.S.C. § 5301(a); App. 32a. The *Mansell* Court expressly declined to rule on that ground of federal preemption, being content to stand on its construction of USFSPA. See 490 U.S. at 587 n.6. As will be discussed below, the VBA (as recently amended and strengthened by Congress) is a significant element in this case.

Also worthy of attention is the fact that state courts, in responding to *Mansell*, have sought to recharacterize a veterans' disability pay as some other sort of marital property or benefit (such as alimony) and make an off-setting award to the former spouse to compensate for a lost share of retired pay income. This arguably occurred in this case. See App. 9a. But this Court earlier warned, in its *McCarty* decision, that "it is clear that the injunction against attachment is not to be circumvented by the simple expedient of an offsetting award." 453 U.S. at 230 n.22. And, yet, a number of state courts have done precisely that in attempting to allocate military disability to a former spouse, even in the absence of a consensual property settlement or indemnification provision in a divorce decree.[4]

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[4] The decision below (as well as the Florida and Tennessee authorities it relies upon) is in manifest conflict with *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992); *In re Strong*, 8 P.3d 763 (Mont. 2000); and *In re Kraft*, 832 P.2d 871 (Wash. 1992) (all prohibiting an offset against disability pay). But see La. Rev. Stat. Ann. 9:2801.1 (where federal law excludes one spouse's benefits from division, court

2. As a consequence of the issues left open in the *McCarty* and *Mansell* decisions, there are today a number of lines of fracture in state court decisions dealing with the proper application of federal veterans' benefits statutes in enforcement of divorce property decrees.

a. One set of these divisions was suggested by the Florida Court of Appeal, App. 3a-9a, insofar as it observed that many state courts have held, notwithstanding *Mansell*, that a recipient of military disability payments may not deprive a former spouse of an equitable interest in receiving a share of retired pay. See App. 9a (relying on *Johnson v. Johnson*, 37 S.W.3d 892, 894 (Tenn. 2001)). Employing these same precedents from other jurisdictions, the Florida Court of Appeal appeared to conclude that states are not preempted from enforcing orders that are res judicata or from reconsidering divorce decrees, even when disability pay is involved.

b. Another set of state court decisions have specifically confronted this Court's ruling in *Mansell* and sought to limit or distinguish it. Some courts have sought to constrain *Mansell* to its facts. After all, Major Mansell was already receiving disability benefits at the time of the dissolution of his marriage; any attempt to divide disability pay as a marital asset would have clearly violated USFSPA. See 490 U.S. at 585. But, according to some state courts, *Mansell*'s facts did not ostensibly speak to the situation where a veteran later decides to forego additional retirement pay in favor of disability pay. Some state courts have seized on this factual nuance as the basis of authority to quantify with certainty the former spouse's interest in a veteran's retired pay, which the former service

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must exclude from division an identical amount of community property in favor of the other spouse).

member is not permitted to frustrate by subsequently voluntarily waiving retired pay.[5] See *Hisgen v. Hisgen*, 554 N.W.2d 494, 497-98 (S.D. 1996); *Abernethy v. Fishkin*, 699 So. 2d 235, 239-40 (Fla. 1997); *In re Marriage of Gaddis*, 957 P.2d 1010, 1013 (Ariz. App. 1997); *In re Marriage of Harris*, 991 P.2d 262, 266 (Ariz. App. 1999); *Johnson v. Johnson*, 37 S.W.3d 892, 896-97 (Tenn. 2001). This may well characterize the approach of the Florida Court of Appeal here. See App. 6a-9a.

In other cases, state courts have enforced divorce decrees or property settlements which provided that the military spouse would indemnify the non-military spouse for any such diminution of retired pay.[6] See *Abernethy*, 699 So.2d at 239-40; *Owen*, 419 S.E.2d at 269-71; *In re Marriage of Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995). Some courts, such as the one here, have taken the same approach even without an express indemnity agreement. See *McHugh v. McHugh*, 861 P.2d 113, 115 (Idaho 1993); *Hisgen*, 554 N.W.2d at 495; *In re Marriage of Neilsen*, 792 N.E.2d 844, 849 (Ill. App. 2003); *Krapf v.*

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[5] Other state courts have noted that *Mansell* was decided in the context of a community property state and that its ruling should not affect a state court's decision to award alimony out of a veteran's disability pay. See, e.g., *Steiner v. Steiner*, 788 So. 2d 771, 778 (Miss. 2001); *Riley v. Riley*, 571 A.2d 1261, 1265 (Md. Ct. Spec. App. 1990); *Weberg v. Weberg*, 463 N.W.2d 382, 384 (Wis. App. 1990). Since Petitioner and Respondent mutually disclaimed alimony or spousal support in their divorce decree, see App. 5a, this issue is not directly raised here, although the state trial court appeared to rule that equitably granting Respondent an interest in Mr. Padot's retirement pay was functionally equivalent to an alimony award. See App. 18a.

[6] No such indemnification clause appears in the divorce decree in this case. See App. 7a-8a.

*Krapf*, 771 N.E.2d 819, 823 (Mass. App. 2002); *Black v. Black*, 842 A.2d 1280, 1285 (Me. 2004); *Hillyer v. Hillyer*, 59 S.W.3d 118 (Tenn. App. 2001). But see *Ashley v. Ashley*, 990 S.W.2d 507 (Ark. 1999); *In re Marriage of Pierce*, 982 P.2d 995 (Kan. App. 1999) (rejecting implied indemnification theory).

Still other state courts have held that the waiver of retirement pay with a corresponding reduction in payments to the non-military spouse was a change in circumstances, which permitted redistribution of marital property or reassessment of support payments. See *In re Marriage of Jennings*, 980 P.2d at 1254-55. Yet other courts have held that if the military retiree waives retired pay to receive disability benefits, the state courts have the equitable power to impose a resulting trust on the money received as disability payments. See *Krapf v. Krapf*, 786 N.E.2d 318, 326 (Mass. 2003); *In re Marriage of Krempin*, 83 Cal.Rptr.2d 134, 143 (Cal. App. 1999). Other courts have emphasized the contractual nature of consensual property divisions upon divorce, and the competence of state courts to enforce such provisions. See *Shelton v. Shelton*, 78 P.3d 507, 508-10 (Nev. 2003); *Poullard v. Poullard*, 780 So.2d 498, 499-500 (La. Ct. App. 2001); *Owen v. Owen*, 419 S.E.2d 267 (Va. App. 1992).

While these state courts have taken slightly different approaches, each achieved a doctrinal end-run around *Mansell*. The common thread in these and other similar cases is the central concept that the nonmilitary former spouse has an inchoate interest in the military retiree's retired pay that can be fixed at the time of divorce, which the retiree should not and will not be permitted to affect. See App. 9a ("the Former Wife obtained a vested interest in a percentage of the Former Husband's military retirement or retainer pay. . . ."). Where the veteran seeks to elect the receipt of disability pay, these state courts have ruled that, *Mansell* notwithstanding, they are at

liberty to modify divorce property settlements to require the effective transfer of a portion of a veteran's disability benefits to a former spouse.

c. But the courts in other jurisdictions have been more respectful of this Court's rulings, resisting the temptation to limit or distinguish *Mansell* to the vanishing point, and to blithely override the preemptive effect of USFSPA. In *Ex parte Billieck*, 777 So. 2d 105 (Ala. 2000), the Alabama Supreme Court held that USFSPA's definition of disposable retired pay, 10 U.S.C. § 1408(a)(4); App. 25a, and this Court's ruling in *Mansell*, ineluctably led to the conclusion that state courts could not modify a divorce property settlement by requiring a veteran to remit disability pay to a former spouse, even where the veteran had agreed (at the time of divorce) to pay a certain percentage of retirement pay which was later foregone in favor of disability pay. See id. at 106-09. See also *Loria v. Loria*, 2006 WL 66359 (Tex. App. Jan. 12, 2006); *Ashley*, 990 S.W.2d at 508-09 (Ark. 1999) (to the same effect).

Kansas courts have reached substantially the same conclusion. In *Matter of the Marriage of Pierce*, 982 P.2d 995 (Kan. App. 1999), the Kansas Court of Appeals ruled that

> *Mansell* makes it perfectly clear that the state trial courts have no jurisdiction over disability benefits received by a veteran. The trial court in this case cannot order Douglas to change the payments back to retirement benefits, and it cannot order him to pay his disability benefits to Priscilla. We conclude the court may not do indirectly what it cannot do directly.

Id. at 998. In a subsequent decision, the Kansas Supreme Court adopted this approach, although ruling that how to characterize a particular veteran's benefits as either retired pay or disability

pay, within the meaning of USFSPA's exclusion clause, 10 U.S.C. § 1408(a)(4)(B), App. 26a, was sometimes a difficult factual matter. See *Matter of the Marriage of Wherrell*, 58 P.3d 734, 737-41 (Kan. 2002).

Other state supreme courts have simply ruled that USFSPA, as interpreted by this Court in *Mansell*, denies state courts the jurisdiction to award former spouses any portion of a veteran's disability pay. See *Clauson v. Clauson*, 831 P.2d 1257, 1262 (Alaska 1992); *Ryan v. Ryan*, 600 N.W.2d 739, 745 (Neb. 1999); see also *Strong*, 8 P.3d at 766 (Mont. 2000) (for a ruling on preemption grounds). Some state intermediate appeals courts have likewise held that the proper interpretation of USFSPA, as construed by *Mansell*, is that divorce decrees cannot be modified in order to transfer a veteran's disability benefits to a former spouse, even where a service member had agreed to share a portion of retirement pay that was later waived to receive disability pay. See *Hapney v. Hapney*, 824 S.W.2d 408 (Ark. App. 1992); *Wright v. Wright*, 594 So. 2d 1139, 1140 (La. App. 1992); *Halstead v. Halstead*, 596 S.E.2d 353 (N.C. App. 2004); *Matter of the Marriage of Reinauer*, 946 S.W.2d 853, 858-59 (Tex. App. 1997); *Keough v. Keough*, 1997 WL 242559 (Va. App. May 13, 1997).

In short, at least six state supreme courts (Alabama, Alaska, Arkansas, Kansas, Montana, and Nebraska), and the intermediate courts of appeals of an additional four jurisdictions (Louisiana, North Carolina, Texas, and Virginia) have taken diametrically the opposite position of that held below by Florida's courts.

2. a. This widely disparate treatment of disability pay in modifications of divorce property decrees involving waived retired pay has not gone unnoticed by the federal agencies charged respectively with the disbursement of veterans' retired

pay and of disability pay, namely the Departments of Defense and Veterans Affairs. In the September 2001 Report prepared by the Department of Defense, at the request of Congress in section 643 of the National Defense Authorization Act, FY 1998, Pub. L. 105-85, 111 Stat. 1629 (1997), it was noted that

> Congress has, on several occasions, chosen to give VA disability compensation a higher priority than payments to former spouses. This is consistent with the treatment historically provided by Congress to VA disability compensation. It has treated it as compensation owed to the member for injuries/wounds incurred in the service of the United States. As such, the Congress has always exempted it from the claims of creditors (it has allowed claims for spousal and child support).

DoD 2001 USFSPA Report, supra note 2, at 3, 81-82. The Department of Defense observed that state courts had given widely variant treatment to disability pay when enforcing an earlier divorce decree that involved waived retired pay, see id. at 52-54 (citing an American Bar Association's April 13, 1999, responses to DoD's inquiries, at 11-12, found at http://www.abanet.org/family/military/nda98.html (last visited Feb. 4, 2006)), and that this would either have to be addressed by Congress or this Court. In any event, the Department of Defense turned aside suggestions that it should institute regulations that would allow the payment of veterans' disability pay to former spouses. It found that this would be a clear contravention of USFSPA, and such a radical change in the law would have to be a matter addressed, in the first instance, by the Veterans Administration, or by Congress. See id. at 82.

Likewise, the Veterans Administration has indicated

that, pursuant to this Court's decision in *Rose v. Rose*, 481 U.S. 619 (1987) (allowing state courts to set child support obligations at levels that veterans would necessarily have to use disability pay to satisfy them), it will allow a garnishment of disability compensation received in lieu of retirement pay to satisfy court-ordered child support, consistent with the nonattachment provision of the Veterans' Benefits Act, 38 U.S.C. § 5301(a). See Statement of John Thompson, Acting General Counsel, Department of Veterans' Affairs, House Committee on Veterans' Affairs, Aug. 5, 1998, *Garnishment of Veterans Affairs Benefits*, available for viewing at http://www.va.gov/OCA/testimony/5AG98AGC_usa.htm (visited Feb. 4, 2006)). Somewhat more controversial was the application of such garnishment for the satisfaction of alimony or spousal support orders, but the VA has apparently been permitting such. See id. The Veterans Administration will not, however, permit the attachment of disability pay as part of a divorce decree. See id.

According to these pronouncements by the relevant federal agencies, it seems clear that the root cause of the widely discordant treatment of veterans' disability pay in state divorce property modification proceedings is not any lack of guidance by the relevant federal statutes on point – USFSPA and the antiattachment provision of the VBA – but, rather, the failure of state courts to give the proper preemptive effect to these laws. That such confusion should persist even after this Court's decision in *Mansell*, with its express holding that USFSPA's treatment of disability pay preempts contrary state law even under the most stringent preemption standards, see 490 U.S. at 587, is deeply troubling and requires this Court's attention.

b. Petitioner needs hardly speculate as to the number of individuals who are potentially affected by this trend in the case law. According to the DoD 2001 USFSPA Report,

supra note 1, at 19, as of April 1, 1999, 1.985 million former service members are receiving retired pay. Assuming even moderate divorce rates and a robust cohort of veterans (a large percentage of which may not have yet been rated for disability), that leaves a large pool of male and female veterans who may find themselves in the situation presented in this case. Indeed, the two million figure surely undercounts the potential class of litigants here, insofar as it excludes those still in the service (and thus not drawing retired or disability pay), even though they may already be divorced and subject to a divorce decree which stipulates as to a future division of retired pay.

3. Even if state courts were unanimous in their holdings that USFSPA does not preempt state court enforcement of divorce decrees involving the division of retired pay later supplanted by disability pay, Petitioner would still refer this issue to the Court's attention in light of its previous ruling in *Mansell*. But state courts have by no means reached such a consensus, and, indeed, as indicated above, have sharply split as to whether such modification proceedings are permissible, and, even if so, under what legal theories they may proceed. The split in state court jurisprudence has not narrowed over time; it has continued to grow.

Likewise, Petitioner believes this is a suitable case for the Court to accept to resolve this matter. The relevant provisions of the divorce decree, see App. 2a, 7a-8a, 16a-17a, are standard. There was no indemnification provision by which a veteran undertakes to compensate a former spouse in the event the veteran seeks to elect disability pay in lieu of retired pay. As even acknowledged by the Florida Court of Appeal, see App. 7a-8a, Petitioner did not purport in the divorce decree to allocate any part of his existing disability pay to the Respondent. Finally, this case does not involve a modification of alimony payments, as both parties to the divorce decree disclaimed any

spousal support. See App. 5a. Simply presented here is the question of whether a state court can, under any legal theory, and consistent with federal law and this Court's ruling in *Mansell*, require a veteran to remit a portion of disability pay in compensation for waived retired pay.

4. a. Without unnecessarily broaching the merits of this issue, Petitioner would merely remark at this stage that this question is settled by the same sensible construction of USFSPA made already by this Court in *Mansell*. Congress has already spoken to the definition of "disposable retired pay" subject to division under USFSPA, 10 U.S.C. § 1408(a)(4)(B); App. 26a, by expressly excluding disability pay from such calculations. Likewise, the savings clause that Congress provided in USFSPA as grounds for state courts to exceed the statutory caps on the automatic remission of retired pay to former spouses, 10 U.S.C. § 1408(e)(6); App. 30a, does not give state courts carte blanche to treat disability pay as retired pay. See *Mansell*, 490 U.S. at 588-90.

The relevant provisions of USFSPA have not changed since this Court's decision in *Mansell*. It would stretch the canons of statutory construction too far to suggest, as the court below appears to, see App. 4a & n.1, that what was found preempted under one statutory scheme is not later to be regarded as preempted under the same scheme. Nor can it seriously be entertained that state courts' reliance – as in the Florida Court of Appeal decision here, see App. 6a-7a (citing *Abernethy v. Fishkin*, 699 So. 2d 235, 237-40 (Fla. 1997) – on principles of state equitable construction of divorce decrees can prevail over a preemptive federal interest.

b. The Florida Court of Appeal's suggestion that federal law does not prevent a divorce decree to be equitably construed to grant a former spouse an interest in disability pay

received in lieu of retired pay, see App. 7a-9a (citing *Johnson*, 37 S.W.3d at 893-94), is manifestly contradicted by the relevant provisions of the Veterans' Benefits Act, 38 U.S.C. § 5301, which provides that

> [p]ayments of benefits due or to become due under any law administered by the Secretary [of Veterans Affairs] shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be . . . exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.

Id. § 5301(a)(1); App. 32a. And, if this was not enough, Congress has recently amended the VBA and this applicable provision, to

> clarify that, in any case where a beneficiary entitled to compensation, pension, or dependency and indemnity compensation enters into an agreement with another person under which agreement such other person acquires for consideration the right to receive such benefit by payment of such compensation, pension or dependency and indemnity compensation, as the case may be. . . such agreement shall be deemed to be an assignment and is prohibited.

Veterans Benefits Act of 2003, Pub. L. No. 108-183, § 702, 117 Stat. 2651, Dec. 16, 2003, codified at § 5301(a)(3)(A); App. 33a.

Petitioner would thus submit that, in addition to the issues raised under USFSPA, this case is an appropriate vehicle

for the Court to revisit the proper construction of the VBA. And while the Florida Court of Appeal was clearly cognizant of the VBA, see App. 4a-8a, it chose to ignore it in its ruling that no federal statute prevents an allocation of veterans' disability pay. Petitioner is mindful that the VBA issue may well turn on this Court's earlier decisions in *Rose*, 481 U.S. at 630-33 (allowing attachment of disability pay to satisfy child support obligations), and *Ridgway v. Ridgway*, 454 U.S. 46 (1981) (rejecting state court's disposition of a veterans' life insurance policy benefits as either marital property or a constructive trust). And although the logic of the *Rose* decision on the VBA's antiattachment clause drew but a bare majority of this Court's members (with O'Connor, Stevens and Scalia, JJ. writing or joining concurrences), the holding was narrowly drafted to cover only child support obligations, and appeared to specifically exclude alimony or spousal support payments or any general attempt to characterize veterans' benefits as marital property divisible upon divorce. See also *Wissner v. Wissner*, 338 U.S. 655 (1950) (state community property law preempted by VBA anti-attachment provision).

Petitioner would maintain before this Court that it would stretch the VBA's antiattachment provision too far to allow state court modifications of divorce decrees by transferring disability pay to former spouses. Given the wide array of veterans' benefits (not just disability pay), and the broad range of circumstances in which these can become encumbered with debt or contractual obligations, this Court's guidance may well be necessary to avoid a wholesale erosion of veterans' benefits through a variety of attachment schemes. Just as Congress has made clear in USFSPA that disability pay is not to be treated as a form of retired pay subject to division with former spouses, there is no indication that Congress intended that disability pay be made available to satisfy the claims of former spouses in

divorce property settlements. Cf. *Rose*, 481 U.S. at 631 ("state contempt proceedings to enforce a valid child support order coincide[s] with Congress' intent to provide veterans' disability compensation for the benefit of both appellant and his dependents."). Indeed, if anything, Congress appears to be as concerned as ever in strengthening the VBA's antiattachment provision to cover the circumstances raised in this case. See Veterans Benefits Act of 2003, Pub. L. No. 108-183, § 702, 117 Stat. 2651, Dec. 16, 2003, codified at § 5301(a)(3)(A); App. 33a.

c. This case presents an opportunity for the Court to not only clarify the relevant standards of preemption that apply where federal veterans' benefits protections apparently conflict with state divorce decrees, but also to conclusively settle the effect of USFSPA and VBA where state courts purport to award disability pay in the guise of enforcing earlier divorce decrees granting portions of retired pay. Additionally, this Court can delimit the precise scope of its earlier rulings in *McCarty* and *Mansell*, and either announce to state courts that they must faithfully adhere to them or are free to continue experimenting in limiting and distinguishing those holdings. Lastly, and not to be discounted, this Court would have the opportunity to declare a coherent and consistent rule of construction for USFSPA and VBA in cases involving the disposition of disability pay, potentially affecting tens of thousands of veterans and their former spouses attempting to manage their respective financial affairs.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID J. BEDERMAN
*Counsel of Record*
1301 Clifton Road
Atlanta, Georgia 30322-2770

*Attorney for Petitioner*

February 2006

# Appendix

NOT FINAL UNTIL TIME EXPIRES TO FILE
REHEARING MOTION AND IF FILED, DETERMINED

**IN THE DISTRICT COURT OF APPEAL**
**OF FLORIDA**
**SECOND DISTRICT**

**KEVIN Y. PADOT,**
**Appellant,**

**v.**

Case No. 2D03-1011
2D03-3843

**BRENDA G. PADOT,**
**Appellee.**

Consolidated

Opinion filed December 15, 2004.
Appeal from the Circuit Court for
Pinellas County; Walt Logan, Judge.

SILBERMAN, Judge.

In this consolidated appeal, Kevin Padot (the Former Husband) challenges orders arising from postdissolution enforcement proceedings regarding his military retirement pay and a military survivor benefit plan. In case number 2D03-1011, we affirm the "Order re Military Retirement" of November 12, 2002, except to the extent that it provides for an income deduction order, and we vacate the clarification order of February 19, 2003. In case number 2D02-3843, we reverse that portion of the Order on Motion for Rehearing of July 24, 2003, that required the Former Husband to cooperate with Brenda

Padot (the Former Wife) to obtain and share the cost of a replacement survivor benefit plan.

## BACKGROUND

The parties were married in 1980, and a final judgment of dissolution was entered on February 1, 1995. In the judgment, the trial court reserved jurisdiction to determine, among other things, issues of equitable distribution and alimony. On March 17, 1995, the trial court entered a Supplemental Order resolving the remaining issues. The Supplemental Order indicates that the parties agreed the Former Wife "shall be entitled to direct payment of a percentage of the [Former Husband's] military retirement or retainer pay" and that the parties agreed on a formula to determine that percentage. The percentage was subsequently computed to be 33.96%. The Supplemental Order also provided, "Neither party shall take any action which shall alter or otherwise reduce the interest of the other party in the retainer pay, retired pay, deferred compensation, or other military benefit."

The Former Husband retired from active military duty on May 1, 2000, and he received his first military retirement pay in June of 2000. As part of the retirement process, he applied for and was awarded veterans' disability payments, with the Veterans' Administration (VA) determining that he was 30% disabled. Under federal law, before the Former Husband could receive the disability benefits, he was required to waive an equal amount of his military retirement pay. See *Mansell v. Mansell*, 490 U.S. 581, 583 (1989). A waiver of retirement pay for disability benefits is common because disability benefits are nontaxable. Id. at 583-84. The Former Husband's waiver went through in December of 2000. In April of 2001, the Former Husband became employed by the federal government in a

civilian capacity as an air traffic controller, a position he had held while in the military.

## FORMER HUSBAND'S WAIVER OF MILITARY RETIREMENT BENEFITS

In July 2002, the Former Wife filed a Motion to Enforce Final Judgment/Supplemental Order. She contended that the Former Husband's waiver of a portion of his military retirement pay in exchange for disability benefits operated to reduce her share of the military retirement pay, in violation of her rights under prior court orders. Additionally, she claimed that the Former Husband improperly sought to reduce a military survivor benefit plan and that the Former Husband should be required to maintain that plan for the benefit of the parties' minor child.

In the Order re Military Retirement entered on November 12, 2002, the trial court determined that the Former Husband's voluntary election to reduce his retirement pay in exchange for disability benefits worked to his benefit, at the expense of the Former Wife. The trial court concluded that the impact of the election violated the provision contained in the 1995 Supplemental Order that prohibited the parties from taking any action to alter or reduce the other party's interest in retainer pay, retired pay, deferred compensation, or other military benefit. The trial court found that the situation was inequitable and that, under *Abernethy v. Fishkin*, 699 So. 2d 235 (Fla. 1997), it had the ability to enforce the Supplemental Order "so long as no funds from the disability pool are drawn upon to fulfill the obligations" the Former Husband owed to the Former Wife. Because the Former Husband had income from his work as an air traffic controller, the trial court concluded that the

Former Husband would be required to make payments to the Former Wife to fulfill the obligations of the Supplemental Order. The court ordered that payments due to the Former Wife "be computed by applying the percentage of 33.96% to the amount that the former spouse's military retirement would have been absent his voluntary reduction of those retirement dollars in favor of disability payments."

The Former Husband, relying on *Mansell*, contends that principles of federal preemption prohibit the result ordered by the trial court. As noted in *Mansell*, at the time of the divorce Major Mansell was already retired and receiving Air Force retirement pay and disability benefits. He obtained the disability benefits by waiving a portion of his retirement pay. The parties' property settlement agreement provided that "Major Mansell would pay Mrs. Mansell 50 percent of his total military retirement pay, including that portion of retirement pay waived so that Major Mansell could receive disability benefits." 490 U.S. at 586. The state divorce court had ordered Major Mansell to pay a portion of his disability benefits directly to Mrs. Mansell, in accordance with the agreement.

The Supreme Court noted that the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408, provides that "disposable retired or retainer pay" is property subject to division by state courts in divorce proceedings. Id. at 584.[1] The Court explained:

" 'Disposable retired or retainer pay' " is defined

[1] Since *Mansell*, 10 U.S.C. § 1408 has been amended to refer to "disposable retired pay," and retired pay is defined to include retainer pay; however, the amendment does not affect the result here. See 10 U.S.C. § 1408(a)(4), (a)(7) (1994); *Abernethy v. Fishkin*, 699 So. 2d 235, 237 n.1 (Fla. 1997).

> as "the total monthly retired or retainer pay to which a military member is entitled," minus certain deductions. § 1408(a)(4) (1982 ed. and Supp. V). Among the amounts required to be deducted from total pay are any amounts waived in order to receive disability benefits. § 1408(a)(4)(B).

Id. at 584-85. The Supreme Court held "that the Former Spouses' Protection Act does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." Id. at 594-95.

The situation in *Mansell*, however, is materially distinguishable from the circumstances of the present case. Here, the Former Husband was still in the military at the time of the divorce, and the parties agreed to a formula to determine the percentage of the Former Husband's "military retirement or retainer pay" to which the Former Wife was entitled. The divorce court ordered that neither party shall take any action to reduce the other party's interest in the retainer or retired pay, and the court retained jurisdiction to enforce the Former Wife's rights to her share of the benefits. The court denied "[a]ll requests for periodic and/or rehabilitative alimony" in this fifteen-year marriage.

At the time of the enforcement proceedings, in addition to receiving retainer pay and tax-free disability income, the Former Husband was employed as a civilian air traffic controller. The trial court noted that the disability pay is shielded from the Former Wife, but the court found that the Former Husband's civilian pay was a source of income that would enable him to comply with the 1995 Supplemental Order. The Order re Military Retirement specifically states, "Nothing

in this Order should be read to require the former husband to pay any portion of his disability retirement income from his active military duty time over to the former wife." Rather, the order contemplates payment from a portion of the remaining military retirement benefits and the Former Husband's current civilian income as an air traffic controller. Thus, the trial court's order is distinguishable from the divorce court's order in *Mansell*.

The Former Husband also contends that under *Mansell* and 10 U.S.C. § 1408, the Florida Supreme Court wrongly decided *Abernethy*. In *Abernethy*, the parties had entered into a marital settlement agreement while the former husband, Richard Abernethy, was still on active duty. Their agreement provided that Monica Fishkin, the former wife, would receive 25% of Abernethy's military retirement pay. The final judgment of dissolution

> entitled Fishkin to monthly payments comprised of twenty-five percent of Abernethy's "net disposable retired or retainer pay." The final judgment also prohibited Abernethy from pursuing any course of action which would defeat Fishkin's right to receive her allotted portion of Abernethy's "full net disposable retired or retainer pay" and required Abernethy to indemnify Fishkin for any breach in this regard.

*Abernethy*, 699 So. 2d at 237 (footnotes omitted). Months later, Abernethy left the Air Force and began receiving military separation benefits. After an enforcement proceeding, he was ordered to pay Fishkin 25% of the separation benefits. Subsequently, Abernethy waived portions of his separation benefits in order to receive veterans' disability benefits. A

second enforcement proceeding ensued.

The supreme court in *Abernethy* determined that federal law preempted the division of veterans' disability benefits either by court order or settlement agreement. Id. at 239. However, the court determined that Fishkin was "entitled to receive payments equal to the amount she was receiving before Abernethy elected veterans' disability benefits." Id. The court reasoned that, unlike in *Mansell*, there was no express provision for the division of disability benefits in the final judgment or settlement agreement. Also, an indemnification provision in the settlement agreement "clearly indicated the parties' intent to maintain level monthly payments pursuant to their property settlement agreement." Id. at 240. The indemnification provision prohibited Abernethy from "pursuing any course of action which would defeat Fishkin's right to receive a portion of his 'full net disposable retired or retainer pay' " and required Abernethy to indemnify Fishkin in that event. Id. Because Abernethy could use other available assets to pay Fishkin rather than disability payments, the court held that the final judgment did not contravene *Mansell*. Id.

The Former Husband contends that apart from being wrongly decided, *Abernethy* is distinguishable because here the Former Husband retired and, at the same time, waived a portion of the retirement benefits in favor of disability benefits. Thus, he argues that the Former Wife never received a steady stream of payments that was later reduced by the waiver. He further argues that the 1995 Supplemental Order did not have an indemnification provision. The Former Husband concludes that the Former Wife is entitled only to 33.96% of his net retainer pay at the time of his retirement.

The parties specifically agreed that the Former Wife was entitled to 33.96% of the Former Husband's "military retirement

or retainer pay," and the Supplemental Order provides that "[n]either party shall take any action which shall alter or otherwise reduce the interest of the other party in the retainer pay, retired pay, deferred compensation, or other military benefit." Although the order does not specifically state that the Former Husband must indemnify the Former Wife if he takes action that reduces her interest, the order gives the court continuing jurisdiction "to enforce the former spouse's rights to her share of the above-described benefits."

In *Janovic v. Janovic*, 814 So. 2d 1096, 1101 (Fla. 1st DCA 2002), the First District stated that when a party merely "seeks to receive what is contemplated by the property settlement agreement incorporated into the final dissolution judgment," then "a trial court may order an equivalent benefit as part of an enforcement action where one spouse takes a voluntary action which defeats the intent of the parties." As in the present case, Mr. Janovic was on active duty when the consent final judgment of dissolution was entered. Less than a year later he was discharged and waived part of his retirement pay to receive disability benefits. The First District held that the subsequent enforcement order requiring Mr. Janovic to indemnify his former wife for the reduction in benefits did not violate *Mansell*. Id. at 1099. The court determined that the lack of an indemnification provision in a settlement agreement is not fatal. Id. at 1101.

We also note that in *Johnson v. Johnson*, 37 S.W.3d 892, 894 (Tenn. 2001), the Tennessee Supreme Court held as follows:

> [W]hen an MDA [marital dissolution agreement] divides military retirement benefits, the non-military spouse obtains a vested interest in his or her portion of those benefits as of the

> date of the court's decree. Any act of the military spouse that unilaterally decreases the non-military spouse's vested interest is an impermissible modification of a division of marital property and a violation of the final decree of divorce incorporating the MDA.

There, the parties' MDA provided that Ms. Johnson would receive, upon retirement, 50% of Mr. Johnson's "military retirement benefits," and after the court entered the final decree, Mr. Johnson waived part of his military retired pay to receive veterans' disability benefits, thereby reducing Ms. Johnson's share. Id. at 893-94.

We agree with the reasoning in *Janovic* and *Johnson* and conclude that the Former Wife obtained a vested interest in a percentage of the Former Husband's military retirement or retainer pay on March 17, 1995, when the trial court entered the Supplemental Order. Thus, when years later the Former Husband took the voluntary action of waiving retainer pay in order to receive disability benefits, the Former Wife's vested interest in his military retirement or retainer pay was reduced. As a result, we find no error in the trial court's conclusion "that equity requires that the former wife be made whole given the totality of the situation concerning the husband's voluntary acts and his ability to supplement and make whole the retirement benefits contemplated in the Final Judgment in favor of the former wife." Thus, we affirm on this issue.

We reject without discussion the Former Husband's alternative argument that the trial court improperly granted the Former Wife the right to share in the Former Husband's separate property. However, the Former Husband also argues, and the Former Wife properly concedes, that section 61.1301, Florida Statutes (2002), does not permit the use of an income deduction

order to effectuate an equitable distribution scheme. See *Motil v. Motil*, 771 So. 2d 1251, 1251 (Fla. 2d DCA 2000). Rather, section 61.1301 limits the use of income deduction orders to payments for alimony or child support. Id. Accordingly, we reverse that portion of the Order re Military Retirement that provides for payment by income deduction order.

## JURISDICTION TO ENTER CLARIFICATION ORDER OF FEBRUARY 19, 2003

The trial court rendered its Order re Military Retirement on November 12, 2002, and its order on rehearing on January 22, 2003. Although there was no motion for rehearing directed to the trial court's order of January 22, 2003, the trial court held a telephonic conference with the parties on February 12, 2003.[2] The trial court then entered the clarification order of February 19, 2003, regarding the issue of "retroactivity." The Former Husband argues that the trial court was without jurisdiction to enter the clarification order. The Former Wife contends that the trial court properly entered the clarification order pursuant to Florida Rule of Civil Procedure 1.540(a).

Rule 1.540(a) allows the trial court to correct errors "arising from oversight or omission . . . at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders." In *Bolton v. Bolton*, 787 So. 2d 237, 238 (Fla. 2d DCA 2001), this court stated as follows:

> A trial court may correct a clerical error "at any time on its own initiative" pursuant to Florida

[2] Our record does not indicate who initiated the telephonic conference.

> Rule of Civil Procedure 1.540(a), but judicial errors, which include errors that affect the substance of a judgment, must be corrected within ten days after entry of the judgment pursuant to Florida Rule of Civil Procedure 1.530, or by appellate review.

See also *Commonwealth Land Title Ins. Co. v. Freeman*, 29 Fla. L. Weekly D1704 (Fla. 2d DCA July 23, 2004). In *Malone v. Percival*, 875 So. 2d 1286 (Fla. 2d DCA 2004), this court held that an addendum to a final judgment of dissolution, which purported to correct scrivener's errors, constituted an unauthorized amendment of the judgment. The addendum made several changes to the final judgment, including an extension of the time period during which child support would be paid. We concluded that the addition of the provision that extended the child support period was a substantive, not clerical, change that was not authorized by rule 1.540(a). Id. at 1288.

Here, the Order re Military Retirement provided that "all sums due and owing to the former wife are retroactive to the date of the former husband's retirement from active military service." The order on rehearing stated that the retroactive date was "the date of the former husband's re-employment as an air traffic controller," and it did not provide for any payments from the time of the Former Husband's retirement until he became employed as an air traffic controller. The clarification order provided for retroactive payments of 33.96% of the Former Husband's retirement pay from May 2000 (when he retired from the military) through November 2000 and to 33.96% of the retirement pay less the amount of the VA waiver for December of 2000 through March of 2001. The order also provided for retroactive payments without a reduction for the amount of the VA waiver beginning in April of 2001, when the Former Husband became employed as an air traffic controller.

We conclude that the clarification order, by changing the period of retroactivity, changed the substance of the prior order on rehearing. The trial court did not make the change pursuant to the procedures of rule 1.530 or rule 1.540, and the change was not an otherwise authorized clerical correction under rule 1.540. Thus, we vacate the clarification order of February 19, 2003.

## SURVIVOR BENEFIT PLAN

The Former Husband's survivor benefit plan (SBP) is a military annuity that provides the beneficiary a percentage of the deceased service member's retired pay. On May 12, 2003, the Former Wife filed a motion to enforce the March 17, 1995, supplemental final judgment, alleging that the Former Husband failed to protect her right to receive continuing payments from the military, should the Former Husband predecease her, by naming someone else (his current wife) as the SBP beneficiary. In an order entered June 2, 2003, the trial court denied the Former Wife's request to require the Former Husband "to name her as the beneficiary of his Survivor Benefit Plan." On rehearing, the trial court heard testimony from an expert in military benefits regarding replacement coverage to protect the Former Wife's military benefits should the Former Husband predecease her. In the July 24, 2003, Order on Motion for Rehearing, the trial court required the Former Husband to cooperate with the Former Wife to obtain replacement SBP coverage, with the Former Husband to pay 66.04% of the premium and the Former Wife to pay 33.96% of the premium.

The Former Husband argues that the trial court erred in construing the 1995 Supplemental Order as requiring the Former Husband to elect the Former Wife as the SBP beneficiary. The Former Wife relies upon *Wise v. Wise*, 765 So.

2d 898 (Fla. 1st DCA 2000), and *Johnson v. Pogue*, 716 So. 2d 1123 (Miss. Ct. App. 1998), to support the trial court's decision. In both *Wise* and *Johnson*, however, the final judgment specifically required the former husband to elect the former wife as beneficiary of the military SBP. The 1995 Supplemental Order contains no such directive, and in fact, it does not anywhere mention an SBP.

The Former Wife also argues that the trial court was correct based on the language of the 1995 Supplemental Order that "[n]either party shall take any action which shall alter or otherwise reduce the interest of the other party in the retainer pay, retired pay, deferred compensation, or other military benefit." Although the expert witness testified that the SBP is a military benefit, nothing in the 1995 order gave the Former Wife an interest in an SBP. Rather, the 1995 order gave the Former Wife an interest in "military retirement or retainer pay." Therefore, nothing prevented the Former Husband from changing his SBP. Accordingly, we reverse the July 24, 2003, Order on Motion for Rehearing to the extent that it requires the Former Husband to cooperate to obtain and pay for a portion of the cost for replacement SBP coverage. Based on our disposition of this issue, the Former Husband's other issues concerning the SBP are moot.

## CONCLUSION

In summary, we affirm the Order re Military Retirement of November 12, 2002, except to the extent that it provides for an income deduction order; we vacate the clarification order of February 19, 2003; and we reverse that portion of the Order on Motion for Rehearing of July 24, 2003, requiring that the

Former Husband cooperate to obtain and pay for a portion of the premium for a replacement SBP with the Former Wife as beneficiary.

Affirmed in part, reversed in part, and vacated in part.

CASANUEVA and DAVIS, JJ., Concur.

**SUPREME COURT OF FLORIDA**

MONDAY, OCTOBER 3, 2005
**CASE NO.:** SC05-386
Lower Tribunal Nos.: 2D03-3843, 2D03-1011
KEVIN Y. PADOT vs. BRENDA G. PADOT

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

PARIENTE, C.J., and LEWIS, QUINCE, CANTERO and BELL, JJ., concur.

A True Copy

Test:

/s/
Thomas D. Hall
Clerk, Supreme Court

**IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA**

CASE NO. 00-1908FD-24

**BRENDA G. PADOT,**
**Petitioner**

**VS.**

**KEVIN Y. PADOT,**
**Respondent**

**ORDER RE MILITARY RETIREMENT**

The Court has for consideration the former wife's Motion to Enforce Final Judgment filed July 9, 2002. The former husband entered the military April 1980. The parties were thereafter married September 6, 1980. The marriage was dissolved by Final Judgment February 1, 1995. The former husband left active military sen/ice In May 2000. The timeline concerning the military service and the duration of the marriage results in a question concerning the former husband's military retirement.

This file came to the undersigned Court by way of a Petition to Domesticate and Modify and Enforce a Judgment entered in Dade County, State of Florida. The Final Judgment had been entered in Dade County followed by a Supplemental Final Judgment signed March 17, 199S by Circuit Judge DeDee S. Costello.

The former husband was still on active duty when Judge Costello entered the Supplemental Final Judgment. Judge Costello provided at Page 6 in Paragraph (6) for the division of

military benefits. The provision noted 163 months of active duty during the marriage to be divided by the total number of months of creditable service. The resulting fraction would be divided by half to arrive at the former wife's percentage of interest in the military retirement. This court has been requested to do the mathematics and assign a percentage and accordingly has done the math and finds the former wife's share in the former husband's military retirement to be 33.96%.

Judge Costello further ordered In Paragraph (11) of the Supplemental Judgment as follows:

> "... (11) Reduction in Value: Neither party shall take any action which shall alter or otherwise reduce the interest of the other party In the retainer pay, retired pay, deferred compensation, or other military benefit . . . ."

The former husband has applied for and obtained disability benefits. The receipt of the disability benefits are conditioned upon the former husband relinquishing a portion of his normal retirement pay. The process is described in *Abernethy v. Fishkin*, 699 So.2d 235 (Fla. 1997).

The testimony presented to the Court is that the former husband was an air traffic controller while on active duty. After retirement, the husband spent a time involuntarily underemployed, however, the former husband is now employed by the U.S. Government in a civilian capacity as an air traffic controller, The former husband has as sources of income his military retirement that is reduced by the disability payments, the disability payments from the government relating to his military service, and his pay as a civilian air traffic controlling working for the United States Government.

The Court has reviewed case law including *Abernethy*, supra, and *Janovic v. Janovic*, 814 So.2d 1096 (Fla. 1st DCA

2002) which cases address the situation where the former spouse voluntarily elects to transfer part or the former spouse's retirement pay to disability pay. The Court has also reviewed *Mansell v. Mansell*, 490 U.S. 581 (U.S. 1989).

Further review of Judge Costello's March 17, 1995 Supplemental Judgment indicates a denial of alimony to the former wife. Reasonable interpretation of the Supplemental Judgment as a whole could lead a reasonable reviewer to the conclusion that the former wife's share of the military retirement would stand in the place of alimony. Such appeared to be the overall plan set forth in the Supplemental Final Judgment. That plan seems to have been altered by the voluntary action of the former husband which action seems contrary to the provision of Paragraph (11) of the Supplemental Judgment cited above.

The net result that the parties find themselves in today is that the former husband is retired from the military and drawing more from his military service than he would have absent the disability pay. The disability pay carries the advantage of being non-taxable and therefore a dollar for dollar transfer from regular retirement pay to disability inures to the definite benefit of the retired military member/the former husband. Further, under the umbrella of protection provided to the disability pay by federal law, the former husband has further increased the benefit of transferring funds from regular retirement to disability by seeking to shield those funds from the former wife's share as established in the Final Judgment. The net result is a substantial increase derived by the former military member at the expense of his former wife.

Were the facts to end there then perhaps the inequitable nature of the result would be set in place, however, the former husband who has been retired with disability as an air traffic controller from active military duty is now doing the same work

as an air traffic controller at the hire of the U.S. Government in the capacity of a civilian. The pay from the now civilian air traffic controller both inures to his benefit and also provides funds that are not a part of his disability payments which funds are available to supplement the former wife's loss as a result of the former husband's voluntary reduction in retirement pay in favor of disability pay.

The inequity of the present situation in favor of the former husband is undeniable. The Florida Supreme Court has analyzed the scenario set forth in the case at bar in *Abernethy*, supra, and found that Trial Courts are not powerless to enforce the original agreement so long as no funds from the disability pool are drawn upon to fulfiil the obligations of the former husband to the former wife.

The Court finds the equities of the situation to be with the former wife and that the former husband is full well and able to provide with the provision made in the Supplemental Final Judgment by Judge Costello in March 1995.

Nothing in this Order should be read to require the former husband to pay any portion of his disability retirement income from his active military duty time over to the former wife. The Court orders no portion of that pool of funds in whatever amount that pool may be from time to time to be payable over to the former wife.

The Court finds that equity requires that the former wife be made whole given the totality of the situation concerning the husband's voluntary acts and his ability to supplement and make whole the retirement benefits contemplated in the Final Judgment in favor of the former wife.

Accordingly, the Court finds that the payments under the Supplemental Final Judgment shall be computed by applying the percentage of 33.96% to the amount that the former spouse's

military retirement would have been absent his voluntary reduction of those retirement dollars in favor of disability payments. That number shall establish the amount payable on a monthly basis to the former wife by or on behalf of the former husband.

The amount so calculated shall be payable by assignment of the remaining military retirement benefits up to 50% of the amount of the remaining military retirement benefit. The remainder of the allocation due to the former wife shall be payable by Income Deduction Order payable from the former husband's civilian income as an air traffic controller.

Counsel are instructed to confer and apply the appropriate amounts to the directives of this Order and submit appropriate paperwork to the Court for entry.

The Court further finds that all sums due and owing to the former wife are retroactive to the date of the former husband's retirement from active military service. The amount of retroactive payments due/the arrearages shall be payable in equal installments over a two year period bearing the legal rate of interest.

**IT IS SO ORDERED** in Chambers in St. Petersburg, Pinellas County, Florida this 12th day of November, 2002.

/s/_____

WALT LOGAN, CIRCUIT JUDGE

**IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA**

REF: 00-001908FD-25

UCN: 522000DR001908XXFDFD

**BRENDA G. PADOT,**
**Petitioner**

**vs.**

**KEVIN Y. PADOT,**
**Respondent.**

## ORDER ON MOTION FOR REHEARING

The Court heard argument on the Motion for Rehearing filed on behalf of the Respondent/former husband. Argument was presented to the Court on January 22, 2003 which proceeding was recorded with a transcript available if ordered.

The Respondent/former husband argues through counsel that the Court misapplied Federal law in holding that the former husband must pay to the former wife an amount equal to the amount of retirement the wife would have been entitled to had the husband not voluntarily applied for disability pay thus converting part of the retirement pay to disability pay. The Court has reviewed the cases cited and has most particularly relied upon *Abernethy v. Fishkin*, 699 So.2d 235 (Fla. 1997). The Court has once again reread *Abernethy*, supra, and concludes that the Motion for Rehearing is not well taken.

Accordingly, the Motion for Rehearing concerning the military pay question is DENIED.

Upon review of the Court's Order and considering the facts of the case presented to date, the Court finds that one modification is appropriate. In the Order of November 12, 2002 the Court found "...that all sums due and owing to the former wife are retroactive to the date of the former husband's retirement from. active, military service..." The Court has reconsidered and finds that the retroactive amount is appropriate from the date of the former husband's re-employment by the Federal government as an air traffic controller at which time the former husband became re-employed at a pay rate that would provide sufficient funds to meet the requirements of the Court Order. Accordingly, the retroactive date shall be the date of the former husband's re-employment as an air traffic controller.

The former husband filed for rehearing/reconsideration with regard to the bankruptcy issue that had been addressed in this Court's Order on Pending Motions which Order was signed December 12, 2002. The Court has considered the additional argument on the question of dischargability of the attorney's fee award to attorney James Obeso and finds that the Motion for Reconsideration is not well taken. Accordingly, the Motion for Reconsideration on the bankruptcy issued is DENIED.

Finally, the former husband moved for reconsideration with regard to the life insurance issue. The Court considered additional argument and finds that the Motion is not well taken. The Court did advise the former husband that as an alternative to providing insurance coverage the former husband may provide documentary proof that in the event of his demise the child support will be payable through income continuation plans

or Social Security. The Court referred the parties to *Browning v. Browning*, 784 So.2d 1145 (Fla. 2nd DCA 2001).

**IT IS SO ORDERED** in Chambers in St. Petersburg, Pinellas County, Florida this 22nd day of January, 2003.

_/s/_____
WALT LOGAN, CIRCUIT JUDGE

UNITED STATES CODE ANNOTATED

TITLE 10. ARMED FORCES

SUBTITLE A – GENERAL MILITARY LAW

**PART II--PERSONNEL**

**CHAPTER 71--COMPUTATION OF RETIRED PAY**

**§ 1408. Payment of retired or retainer pay in compliance with court orders.**

**(a) Definitions.**--In this section:

**(1)** The term "court" means--

**(A)** any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

**(B)** any court of the United States (as defined in section 451 of title 28) having competent jurisdiction;

**(C)** any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country; and

**(D)** any administrative or judicial tribunal of a State competent to enter orders for support or maintenance (including a State agency administering a program under a State plan approved under part D of title IV of the Social Security Act), and, for purposes of this subparagraph, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

**(2)** The term "court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or

a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), or a support order, as defined in section 453(p) of the Social Security Act (42 U.S.C. 653(p)), which--

**(A)** is issued in accordance with the laws of the jurisdiction of that court;

**(B)** provides for--

**(i)** payment of child support (as defined in section 459(i)(2) of the Social Security Act (42 U.S.C. 659(i)(2)));

**(ii)** payment of alimony (as defined in section 459(i)(3) of the Social Security Act (42 U.S.C. 659(i)(3))); or

**(iii)** division of property (including a division of community property); and

**(C)** in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired pay, from the disposable retired pay of a member to the spouse or former spouse of that member.

**(3)** The term "final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

**(4)** The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which--

**(A)** are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by

law resulting from entitlement to retired pay;

**(B)** are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-marital or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;

**(C)** in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

**(D)** are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

**(5)** The term "member" includes a former member entitled to retired pay under section 12731 of this title.

**(6)** The term "spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

**(7)** The term "retired pay" includes retainer pay.

* * * *

**(c) Authority for court to treat retired pay as property of the member and spouse.--(1)** Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such

court. A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse. Payments by the Secretary concerned under subsection (d) to a spouse or former spouse with respect to a division of retired pay as the property of a member and the member's spouse under this subsection may not be treated as amounts received as retired pay for service in the uniformed services.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

* * * *

**(e) Limitations.--(1)** The total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not exceed 50 percent of such disposable retired pay.

**(2)** In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse, the disposable retired pay of the member shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired pay which remains after the satisfaction of all court orders which have been previously served.

**(3)(A)** In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall--

**(i)** pay to that spouse from the member's disposable retired pay the least amount directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

**(ii)** retain an amount of disposable retired pay that is equal to the lesser of--

**(I)** the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

**(II)** the amount of disposable retired pay which remains

available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus--

(I) the amount of disposable retired pay paid under clause (i); and

(II) the amount of disposable retired pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (a) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the same member, satisfaction of such court orders and legal process from the retired pay of the member shall be on a first-come, first-served basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal

process which have been previously served.

**(B)** Notwithstanding any other provision of law, the total amount of the disposable retired pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the amount of the retired pay payable to such member that is considered under section 462 of the Social Security Act (42 U.S.C. 662) to be remuneration for employment that is payable by the United States.

**(5)** A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of disposable retired pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an amount that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

**(6)** Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any

means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

{Added Pub.L. 97-252, Title X, § 1002(a), Sept. 8, 1982, 96 Stat. 730, and amended Pub.L. 98-525, Title VI, § 643(a) to (d), Oct. 19, 1984, 98 Stat. 2547; Pub.L. 99-661, Div. A, Title VI, § 644(a), Nov. 14, 1986, 100 Stat. 3887; Pub.L. 100-26, §§ 3(3), 7(h)(1), Apr. 21, 1987, 101 Stat. 273, 282; Pub.L. 101-189, Div. A, Title VI, § 653(a)(5), Title XVI, § 1622(e)(6), Nov. 29, 1989, 103 Stat. 1462, 1605; Pub.L. 101-510, Div. A, Title V, § 555(a) to (d), (f), (g), Nov. 5, 1990, 104 Stat. 1569, 1570; Pub.L. 102-190, Div. A, Title X, § 1061(a)(7), Dec. 5, 1991, 105 Stat. 1472; Pub.L. 102-484, Div. A, Title VI, § 653(a), Oct. 23, 1992, 106 Stat. 2426; Pub.L. 103-160, Div. A, Title V, § 555(a), (b), Title XI, § 1182(a)(2), Nov. 30, 1993, 107 Stat. 1666, 1771; Pub.L. 104-106, Div. A, Title XV, § 1501(c)(16), Feb. 10, 1996, 110 Stat. 499; Pub.L. 104-193, Title III, §§ 362(c), 363(c)(1) to (3), Aug. 22, 1996, 110 Stat. 2246, 2249; Pub.L. 104-201, Div. A, Title VI, § 636, Sept. 23, 1996, 110 Stat. 2579; Pub.L. 105-85, Div. A, Title X, § 1073(a)(24), (25), Nov. 18, 1997, 111 Stat. 1901; Pub.L. 107-107, Div. A, Title X, § 1048(c)(9), Dec. 28, 2001, 115 Stat. 1226.}

UNITED STATES CODE ANNOTATED

TITLE 38. VETERANS' BENEFITS

**PART IV--GENERAL ADMINISTRATIVE PROVISIONS**

**CHAPTER 53--SPECIAL PROVISIONS RELATING TO BENEFITS**

**§ 5301. Nonassignability and exempt status of benefits.**

**(a) (1)** Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments. The provisions of this section shall not be construed to prohibit the assignment of insurance otherwise authorized under chapter 19 of this title, or of servicemen's indemnity.

**(2)** For the purposes of this subsection, in any case where a payee of an educational assistance allowance has designated the address of an attorney-in-fact as the payee's address for the purpose of receiving a benefit check and has also executed a power of attorney giving the attorney-in-fact authority to negotiate such benefit check, such action shall be deemed to be

an assignment and is prohibited.

(3) (A) This paragraph is intended to clarify that, in any case where a beneficiary entitled to compensation, pension, or dependency and indemnity compensation enters into an agreement with another person under which agreement such other person acquires for consideration the right to receive such benefit by payment of such compensation, pension, or dependency and indemnity compensation, as the case may be, except as provided in subparagraph (B), and including deposit into a joint account from which such other person may make withdrawals, or otherwise, such agreement shall be deemed to be an assignment and is prohibited.

(B) Notwithstanding subparagraph (A), nothing in this paragraph is intended to prohibit a loan involving a beneficiary under the terms of which the beneficiary may use the benefit to repay such other person as long as each of the periodic payments made to repay such other person is separately and voluntarily executed by the beneficiary or is made by preauthorized electronic funds transfer pursuant to the Electronic Funds Transfers Act (15 U.S.C. 1693 et seq.).

(C) Any agreement or arrangement for collateral for security for an agreement that is prohibited under subparagraph (A) is also prohibited and is void from its inception.

(b) This section shall prohibit the collection by setoff or otherwise out of any benefits payable pursuant to any law administered by the Secretary and relating to veterans, their estates, or their dependents, of any claim of the United States or any agency thereof against (1) any person other than the indebted beneficiary or the beneficiary's estate; or (2) any beneficiary or the beneficiary's estate except amounts due the United States by such beneficiary or the beneficiary's estate by reason of overpayments or illegal payments made under such

laws to such beneficiary or the beneficiary's estate or to the beneficiary's dependents as such. If the benefits referred to in the preceding sentence are insurance payable by reason of yearly renewable term insurance, United States Government life insurance, or National Service Life Insurance issued by the United States, the exemption provided in this section shall not apply to indebtedness existing against the particular insurance contract upon the maturity of which the claim is based, whether such indebtedness is in the form of liens to secure unpaid premiums or loans, or interest on such premiums or loans, or indebtedness arising from overpayments of dividends, refunds, loans, or other insurance benefits.

**(c)(1)** Notwithstanding any other provision of this section, the Secretary may, after receiving a request under paragraph (2) of this subsection relating to a veteran, collect by offset of any compensation or pension payable to the veteran under laws administered by the Secretary the uncollected portion of the amount of any indebtedness associated with the veteran's participation in a plan prescribed in chapter 73 of title 10.

**(2)** If the Secretary concerned (as defined in section 101(5) of title 37) has tried under section 3711(a) of title 31 to collect an amount described in paragraph (1) of this subsection in the case of any veteran, has been unable to collect such amount, and has determined that the uncollected portion of such amount is not collectible from amounts payable by that Secretary to the veteran or that the veteran is not receiving any payment from that Secretary, that Secretary may request the Secretary to make collections in the case of such veteran as authorized in paragraph (1) of this subsection.

**(3)(A)** A collection authorized by paragraph (1) of this subsection shall be conducted in accordance with the procedures prescribed in section 3716 of title 31 for administrative offset

collections made after attempts to collect claims under section 3711(a) of such title.

**(B)** For the purposes of subparagraph (A) of this paragraph, as used in the second sentence of section 3716(a) of title 31--

**(i)** the term "records of the agency" shall be considered to refer to the records of the department of the Secretary concerned; and

**(ii)** the term "agency" in clauses (3) and (4) shall be considered to refer to such department.

**(4)** Funds collected under this subsection shall be credited to the Department of Defense Military Retirement Fund under chapter 74 of title 10 or to the Retired Pay Account of the Coast Guard, as appropriate.

**(d)** Notwithstanding subsection (a) of this section, payments of benefits under laws administered by the Secretary shall not be exempt from levy under subchapter D of chapter 64 of the Internal Revenue Code of 1986 (26 U.S.C. 6331 et seq.).

**(e)** In the case of a person who--

**(1)** has been determined to be eligible to receive pension or compensation under laws administered by the Secretary but for the receipt by such person of pay pursuant to any provision of law providing retired or retirement pay to members or former members of the Armed Forces or commissioned officers of the National Oceanic and Atmospheric Administration or of the Public Health Service; and

**(2)** files a waiver of such pay in accordance with section 5305 of this title in the amount of such pension or compensation before the end of the one-year period beginning on the date such person is notified by the Secretary of such person's eligibility for such pension or compensation, the retired or retirement pay of such person shall be exempt from taxation, as provided in subsection (a) of this section, in an amount equal to the amount

of pension or compensation which would have been paid to such person but for the receipt by such person of such pay.

{Pub.L. 85-857, Sept. 2, 1958, 72 Stat. 1229, § 3101; Pub.L. 94-502, Title VII, § 701, Oct. 15, 1976, 90 Stat. 2405; Pub.L. 95-479, Title III, § 301, Oct. 18, 1978, 92 Stat. 1564; Pub.L. 97-295, § 4(74), Oct. 12, 1982, 96 Stat. 1310; Pub.L. 99-576, Title V, § 504, Title VII, § 701(68), Oct. 28, 1986, 100 Stat. 3286, 3296; renumbered § 5301 and amended Pub.L. 102- 40, Title IV, § 402(b)(1), (d)(1), May 7, 1991, 105 Stat. 238, 239; Pub.L. 102-54, § 14(d)(2), June 13, 1991, 105 Stat. 285; Pub.L. 102-83, 4(a)(1), (2)(A)(vii), (b)(1), (2)(E), (4)(C), Aug. 6, 1991, 105 Stat. 403- 405; Pub.L. 102-86, Title V, § 505(a), Aug. 14, 1991, 102 Stat. 426; Pub.L. 101-189, Div. A, Title XIV, § 1404(b)(2), Nov. 29, 1989, 103 Stat. 1586; Pub.L. 102-25, Title VII, § 705(c)(2), Apr. 6, 1991, 105 Stat. 120; renumbered and amended Pub.L. 102-40, Title IV, § 402(b)(1), (d)(1), May 7, 1991, 105 Stat. 238, 239; Pub.L. 102-54, § 14(d)(2), June 13, 1991, 105 Stat. 285; Pub.L. 102-83, § 4(a)(1), (2)(A)(vii), (b)(1), (4)(C), Aug. 6, 1991, 105 Stat. 403-405; Pub.L. 102-86, Title V, § 505(a), Aug. 14, 1991, 102 Stat. 426; Pub. L. No. 108-183, § 702, Dec. 16, 2003.}

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No. 05-1076

Supreme Court, U.S.
FILED
NOV 30 2006
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

KEVIN Y. PADOT,

*Petitioner,*

v.

BRENDA G. PADOT,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Second District Court Of Appeal Of Florida**

## SUPPLEMENTAL BRIEF OF PETITIONER

DAVID J. BEDERMAN
*Counsel of Record*
1301 Clifton Road
Atlanta, Georgia 30322-2770
(404) 727-6822

*Attorney for Petitioner*

## SUPPLEMENTAL BRIEF OF PETITIONER

Pursuant to S. Ct. R. 15.8, Petitioner responds to the brief filed by the Solicitor General at the Court's invitation ["U.S. Br."]. While Petitioner is mindful that the Court usually accepts the government's suggestion to deny review in a particular case,[1] insofar as the Solicitor General's recommendation here is premised on three false assumptions, the Court should nonetheless grant review.

1. The first, and most significant, misapprehension by the government is reflected throughout its brief: that Petitioner had unconditionally agreed to pay his former spouse 33.96% of all his military retired pay. See U.S. Br. (i), 3, 7. In actuality, Petitioner agreed to pay Respondent that proportion of his *disposable* retired pay, as defined by federal law, in the Uniformed Services Former Spouses' Protection Act (USFSPA), see 10 U.S.C. § 1408(a)(4), and Florida law, see Fla. Stat. Ann. § 61.076(2)(c). This is confirmed in paragraph 2(B)(12) of the March 17, 1995, Supplemental Order dividing the marital estate. See Pet. App. 16a-17a. Disposable retired pay, as the government concedes, see U.S. Br. 2, excludes amounts waived in order to receive military disability pay.

The distinction between "retired pay" and "disposable

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[1] But see *Laboratory Corp. of Am. Holdings v. Metabolite Laboratories, Inc.*, 126 S.Ct. 543 (2005) (certiorari granted despite adverse recommendation of SG; later DIG'ed on grounds not related to SG's objection); *Bank of China v. NBM LLC*, 125 S. Ct. 2956 (2005) (same; later Rule 46.1 dismissed); *Bates v. Dow Agrosciences LLC*, 542 U.S. 936 (2004) (same; decided); *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 540 U.S. 1175 (2004) (same; decided); *South Fla. Water Management Dist. v. Miccosukee Tribe of Indians*, 539 U.S. 957 (2003) (same; decided).

retired pay" is crucial to this case. The Supplemental Order, at issue here, is a boiler-plate document, endorsed no less than by the American Bar Association. See Gale S. Finley, ASSIGNING RETIREMENT BENEFITS IN DIVORCE: A PRACTICAL GUIDE TO NEGOTIATING AND DRAFTING QDROS (ABA; 2d ed. 1999). Even more pertinently, the Florida act that requires that a final court judgment dividing military retired pay must be "expressed in dollars or as a percentage of the disposable retired or retainer pay," Fla. Stat. Ann. § 61.076(2)(c), is replicated in many other state statutes and decisional law.[2]

2. The government also asserts, U.S. Br. 17, that Petitioner's arguments, based on the anti-attachment provisions of 38 U.S.C. § 5301(a), were not raised below. This is untrue. They were raised initially before the Florida Circuit Court, see Former Husband's Amended Motion for Rehearing & Clarification, at 1-2 (¶¶ 3 & 6) (Jan. 17, 2003), and more particularly in the Florida Court of Appeals in Petitioner's opening brief before that court. See Appellant's Amended Initial Brief, at 17 ("military retirement benefits . . . are protected from creditors or anyone else who would 'anticipate' the receipt of benefits by an anti-attachment provision. Similarly, the only exception to this statutory anti-attachment provision is to satisfy a legal obligation for child support or alimony.") (citations omitted) (Nov. 26, 2003).

As for the merits of Petitioner's anti-attachment contention, the government blithely ignores the controlling statutory provision, when it asserts (U.S. Br. 18) that offsets

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[2] See, e.g., Ind. Code § 31-9-2-98(b)(3) (2006); Me. Rev. Stat. Ann. tit. 19-A, § 2604 (2006); W. Va. Code §§ 48-7-104 et seq. (2006); *McHugh v. McHugh*, 861 P.2d 113, 114 (Idaho 1993); *Goodson v. Goodson*, 744 A.2d 828, 829 (R.I. 2000).

against non-disability pay income, such as were ordered here, are perfectly permissible. In 2003, after the Florida Circuit court entered its judgments, see Pet. App. 20a, 23a, but before the Florida Court of Appeals issued its ruling, Pet. App. 1a, Congress amended the veterans benefits anti-attachment law to cover the circumstances presented here. See Veterans Benefits Act of 2003, Pub. L. No. 108-183, § 702, 117 Stat. 2651, Dec. 16, 2003, codified at § 5301(a)(3)(A); App. 33a ("clarify[ing] that, in any case where a beneficiary... enters into an agreement with another person under which agreement such other person acquires for consideration the right to receive such benefit by payment of such compensation . . . such agreement shall be deemed to be an assignment and is prohibited.").[3] The anti-attachment issue was preserved below, and merits review here.

3. The balance of the government's brief is devoted to the pursuit of a chimerical doctrinal distinction between state court decisions which enforce the contractual allocation of military disability pay received in lieu of retired pay, as opposed to those orders based on equitable grounds. While the Solicitor General grudgingly concedes, U.S. Br. 10, that there is a conflict in authority on the equitable theory, he contends that there is not on the application of state contract-law, which, he argues, is the basis presented in the decision below. Neither the factual premise, nor the legal conclusion, of this assertion is correct.

For starters, the decision below is, in fact, premised on a blend of equitable and contract idioms. See Pet. App. 2a, 3a ("The trial court found that the situation was inequitable. . . ."), 9a ("we find no error in the trial court's conclusion 'that equity

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[3] As the government notes, U.S. Br. 17 n.9, this provision was cited to the Florida Court of Appeals, albeit on rehearing, which was the first opportunity that Petitioner had after its codification.

requires that the former wife be made whole given the totality of the situation concerning the husband's voluntary acts and his ability to supplement and make whole the retirement benefits contemplated in the Final Judgment in favor of the former wife'."). Moreover, insofar as the Florida appeals court relied on *Abernethy v. Fishkin*, 699 So. 2d 235 (Fla. 1997), see Pet. App. 3a, 4a n.1, 6a-7a, that decision likewise mixes equitable and contract principles. See id. at 239 ("We reach this conclusion because the final judgment in the present case does not transgress the USFSPA and *Mansell*, which exclude veterans' disability benefits from equitable distribution or assignment via property settlement agreement.").

And while the Solicitor General makes light, see U.S. Br. 16, of the absence of an express indemnification agreement here, that is positively crucial in establishing that this case truly does involve state courts applying equity to avoid what would otherwise be the preemptive effect of federal law. See *Ex Parte Billeck*, 777 So. 2d 105, 109 (Ala. 2000) ("The agreement does not contain an indemnification provision to protect the monthly sum the wife would receive should the husband's military retirement benefits be reduced.") (expressly distinguishing *Abernethy*). To the extent that the government asserts that the generic provisions of the Supplemental Order, are, in fact, a contractual promise to indemnify former spouses in the event that disability pay is elected, the Solicitor General's distinction between equitable and contractual theories dissolves into a gooey solepcism. The government appears[4] to counsel here that

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[4] The government's position asserted here contradicts that taken in the Department of Defense's 2001 *Report to Congress Concerning Federal Former Spouse Protection Laws*, http://www.dod.mil/prhome/spouserev.html, at 81 ("for each dollar of VA disability compensation awarded, the member's disposable

USFSPA section 1408(a)(4) has no preemptive effect, even when directly incorporated into state law, as in Florida.

Moreover, the schism in state authority on these issues is deeper and wider than the government cares to admit. Happily, the Court need not take Petitioner's word for this; the split has been noticed in a number of recent state court rulings. See, e.g., *Marriage of Landis*, 113 P.3d 456, 458 (Or. App. 2005) ("A few courts have concluded that the line [between division of disability pay and fashioning a just division of property] is not fine at all, but nonexistent – a fiction."). It is time for the Court to lay this fiction to rest.

## CONCLUSION

The petition should be granted.

Respectfully submitted.

DAVID J. BEDERMAN
*Counsel of Record*
1301 Clifton Road
Atlanta, Georgia 30322-2770

*Attorney for Petitioner*

November 30, 2006

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retired pay is also reduced one dollar. In cases where the member receives a 100 percent disability rating, all payments to the former spouse may cease. This result is due to the provisions of the VA Disability Compensation System – not [USFSPA]."), App. F, at 6-7. The Solicitor General admits, U.S. Br. 18-19 n.11, that of the nearly .8 million divorced veterans concurrently receiving retired and disability pay, 600,000 are potentially impacted by this decision.

FILED
MAY 23 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

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On Petition for A Writ of Certiorari
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# BRIEF IN OPPOSITION

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JANE HARLEY GROSSMAN
*Counsel of Record*
132 24th Avenue North
St. Petersburg, Florida 33704
Phone (727) 823-7600
*Counsel for Respondent*

FILED
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**BRIEF IN OPPOSITION**

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JANE HARLEY GROSSMAN
*Counsel of Record*
132 24th Avenue North
St. Petersburg, Florida 33704
Phone (727) 823-7600
*Counsel for Respondent*

## QUESTION PRESENTED FOR REVIEW

**Where a veteran has elected to take military disability pay in lieu of retired pay, may state courts, in contravention of federal statutes, 10 U.S.C. 1408 and 38 U.S.C. 5301, and this Court's ruling in *Mansell v. Mansell*, 490 U.S. 581 (1989), nonetheless require former service members to remit to former spouses a part of that foregone pay, even without an indemnification provision in the divorce property settlement?**

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## INTRODUCTION

The issue in this case is whether the Uniformed Services Former Souses Protection Act (hereafter USFSPA) as interpreted by this Court in *Mansell v. Mansell*, 490 U.S. 581, 109 (1989) pre-empts or in any way restricts state courts from enforcing a divorce decree as it relates to a former military members *post-judgment* conversion of retirement benefits to veterans' disability pay, when a portion of those retirement benefits were previously allocated to the non-military spouse in the property distribution. There has been no pre-emption of federal law in the instant case , as the waiver of retirement benefits in lieu of disability pay occurred post-judgment. Further, the Florida Circuit Court very specifically, in respect of *Mansell,* clarified that Mr. Padot is not required to utilize any of his veterans' disability pay to satisfy his obligation to Mrs. Padot.

## STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Petitioner's Statement (of the Case and Facts) as accurate but supplements it with the following:

1. The Supplemental Order of 1995 divided Mr. Padot's military retirement benefits and provided a specific formula to be utilized in calculating the exact percentage to be awarded Mrs. Padot upon his retirement from military service. (Petitioner's App. pp. 16a - 20a). The Supplemental Order also provided that the court would have continuing jurisdiction "to enforce the former spouse's rights to her share of the [retirement] benefits." (Petitioner's App. p. 8a).

2. In April 2001, after Mr. Padot retired from the military and converted a portion of the military retirement benefits to veterans' disability benefits, he became employed as a civilian air traffic controller working for the United States government. (Petitioner's App. pp. 16a - 17a).

3. In its Order Re: Military Retirement, the Florida Circuit Court found:

> "Further review of Judge Costello's March 17, 1995 Supplemental judgment indicates a denial of alimony to the former wife. Reasonable interpretation of the Supplemental Judgment as a whole could lead a reasonable reviewer to the conclusion that the former wife's share of the military retirement would stand in the place of alimony. Such appeared to be the overall plan set forth in the Supplemental Final Judgment. That plan seems to have been altered

> by the voluntary action of the former husband which actions seems contrary to the provision of Paragraph (11) of the Supplemental Judgment. (Petitioner's App. p. 18a).

4. Paragraph (11), referenced by the trial court, provided:

> " . . . (11) Reduction in Value: Neither party
>
> shall take any action which shall alter or otherwise reduce the interest of the other party in the retainer pay, retired pay, deferred compensation, or other military benefit . . ." (Petitioner's App. p. 17a).

5. The Florida Circuit Court, noting that Mr. Padot was working as a civilian air traffic controller, in addition to receiving military retirement benefits and veterans disability pay, found:

> The net result that the parties find themselves in today is that the former husband is retired from the military and drawing more from his military service than he would have absent the disability pay. The disability pay carried the advantage of being non-taxable and therefore a dollar for dollar transfer from regular retirement pay to disability inures to the definite benefit of the retired military member/the former husband. Further, by federal law, the former husband has further increased the benefit of transferring funds from regular retirement to disability by seeking to shield those funds from the former

wife's share as established in the Final Judgment. The net result is a substantial increase derived by the former military member at the expense of his former wife.

> Were the facts to end there then perhaps the inequitable nature of the result would be set in place, however, the former husband who has been retired with disability as an air traffic controller from active military duty is now doing the same work as an air traffic controller at the hire of the U.S. Government in the capacity of a civilian. The pay from the now civilian air traffic controller both inures to his benefit and also provides funds that are not a part of his disability payment which funds are available to supplement the former wife's loss as a result of the former husband's voluntary reduction in retirement pay in favor of disability pay. (Petitioner's App. pp. 18a - 19a)

6. The Florida Circuit Court clarified that:

> Nothing in this Order should be read to require the former husband to pay any portion of his disability retirement income from his active military duty time over to the former wife. The Court orders no portion of that pool of funds in whatever amount that pool may be from time to time to be payable over to the former wife. (Petitioner's App. p. 19a).

Mr. Padot appealed the Florida Circuit Court Order to the Second District Court of Appeal of Florida which rendered

its Opinion on December 15, 2004. (Petitioner's Appendix pp. 1a - 14a). The Florida Appellate Court noted its review of the law of *Mansell*, correctly concluding, however, that *Mansell* did not control, given the factual distinctions of the instant case (Petitioner's App. p. 9a).

## REASONS FOR DENYING THE PETITION

### NEITHER THE USFSPA NOR *MANSELL V. MANSELL* RESTRICT THE AUTHORITY OF STATE COURTS TO GRANT EQUITABLE ENFORCEMENT RELIEF WHEN A FORMER MILITARY MEMBER UNILATERALLYCONVERTS, *POST JUDGMENT*, RETIREMENT BENEFITS TO VETERANS' DISABILITY PAY, INCLUDING THE PORTION OF THE BENEFITS PREVIOUSLY AWARDED TO THE FORMER SPOUSE IN A DIVORCE DECREE.

The decision of the Florida Circuit Court, as affirmed by the Florida Appellate Court, Second District of Florida, does not violate the Supremacy Clause of the United States Constitution. The decision does not impermissibly contravene the USFSPA, as interpreted by this Court in *Mansell*. The decision, in fact, is very respectful of the applicable federal law.

*Mansell* does not apply to State courts' enforcement of divorce decrees which divide military retirement benefits, when those benefits are converted, *post-judgment*, to veterans' disability payments. The Florida Circuit Court Order does not violate the anti-attachment provision of 38 U.S.C. § 5301, as it specifically clarifies that it was not requiring Mr. Padot to use any portion of his disability pay to satisfy his obligation to Mrs. Padot.

This Court has recognized the long standing general rule that "[T]he whole subject of the domestic relations of husband and wife,

parent and child, belongs to the laws of the States and not to the laws of the United States." *Boggs v. Boggs*, 520 U.S. 833 (1997), citing *In re Burrus*, 136 U.S. 586, 593-598 (1890). In *Rose v. Rose*, 481 US. 619 (1987), this Court reiterated, "On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination of whether Congress has 'positively required by direct enactment' that State law be pre-empted." (citing *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979). This Court further recognized, "Before a state law governing domestic relations will be overridden, it "must do 'major damage' to clear and substantial federal interests." Id. at 625.

The USFSPA clearly authorizes state courts to treat "disposable retired or retainer pay" as marital property. 10 U.S.C. § 1408(c)(1)(2003). Disposable retired or retainer pay does not include amounts waived to receive disability benefits. 10 U.S.C. § 1408(a)(4)(B)(2003). Congress has provided specific language as to what constitutes "disposable retired or retainer pay" and grants authority of the state courts to treat the pay as marital property, but there is no "positive requirement by direct enactment" which restricts state courts in any way from granting equitable relief to a former non-military spouse when the retired pay is converted, post-judgment, and the conversion deprives the former non-military spouse of a vested property interest.

The applicable language of *Mansell* provides; "[T]he Former Spouses' Protection Act does not grant state courts the power to treat as property *divisible upon divorce* military retirement pay that has been waived to receive veterans' disability benefits." (Emphasis added) 490 U.S. at 593. Many state courts have interpreted the plain language of this holding to restrict division of disability benefits

which exist only as of the date of the divorce and that state courts have the authority to enforce a former non-military spouse's entitlement to retirement benefits awarded and thereby vested in the divorce. See e.g. *Black v. Black*, 842 A.2d 1280 (Me. 2004) "Because *Mansell* explicitly addressed the USFSPA as precluding a state divorce court from treating military retirement pay that had previously been converted to disability pay 'as property division *upon divorce*,' we agree with those jurisdictions that conclude that the USFSPA does not limit the authority of a state court to grant post-judgment relief when military retirement pay previously divided by a divorce judgment is converted to disability pay, so long as the relief awarded does not itself attempt to divide disability pay as marital property." (Emphasis in the original)

The equitable principle applied by the state courts is that a former military member's unilateral conversion of benefits previously awarded to a former non-military spouse is an impermissible modification of a vested property interest. See *Warkocz v. Warkocz*, 2006 WL 871162 (Colo. App.) "[T]he dissolution decree gave the wife a vested interest in the husband's military retirement benefit which interest was entitled to enforcement . . ."; *Shelton v. Shelton*, 119 Nev. 492, 78 P.3d 507 (Nev. 2003) "Although states cannot divide disability payments as community property, states are not preempted from enforcing orders that are res judicata or from enforcing contracts or from reconsidering divorce decrees, even when disability pay is involved."); *Gurtz v. Gurtz*, 186 S.W.3d 435 (Mo. Ct. App. 2006), "Once it has been divided as part of a final decree, a pension may not be redivided after circumstances have changed."; *Knapf v. Knapf*, 55 Mass. App. Ct. 485, 771 N.E.2d 819 (Mass. App. Ct. 2002), aff'd 786 N.E.2d 819 (Mass. 2003) "[W]e conclude that the judge's order did not constitute a division of veterans' disability payments, but rather gave

meaning to the plaintiff's rights under the contract by directing payment that gave her the economic value of her promised equal share of the defendant's military retirement pay."; *Black v. Black*, 842 A.2d at 1285, "[W]e agree with those jurisdictions that conclude that the USFSPA does not limit the authority of a state court to grant post-judgment relief when military retirement pay previously divided by a divorce judgment is converted to disability pay, so long as the relief awarded does not itself attempt to divide disability pay as marital property."; In re the Marriage of *Gaddis*, 191 Ariz. 467, 957 P.2d 1010 (Ariz. Ct.App. 1998), "[We] decline to require court to disturb property allocation in final divorce decrees when a former spouse/military retiree obtains civil service employment after the decree has been entered." See also *Hisgen v. Hisgen*, 554 N.W.2d 494 (S.D. 1996); *Hillyer v. Hillyer*, 59 S.W.3d 118 (Tenn. Ct. App. 2001); *and Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992). These courts have found that there is no pre-emption of federal law in their grant of post-judgment enforcement relief to a former non-military spouse whose retirement benefits were unilaterally converted to disability benefits subsequent to the divorce.

The Florida Circuit Court and the Florida Appellate Court both found that the relief awarded Mrs. Padot did not violate *Mansell*. The Florida Appellate Court distinguished the instant case from *Mansell* in that here, Mr. Padot was still in the military at the time of the divorce. His waiver of retirement benefits in lieu of disability benefits occurred post-judgment. After his waiver he obtained employment and had income other than his disability pay with which to satisfy the property award to Mrs. Padot. In *Mansell* this court addressed the application of the USFSPA to a pre-judgment waiver of retirement pay in lieu of disability pay. 490 U.S. 581, 585-586. Also distinguishing the instant case from *Mansell* is

the fact the Florida Circuit Court specifically ruled that it was not ordering Mr. Padot to utilize his disability pay to comply with the divorce decree.

Justice O'Connor, writing for the dissent In *Mansell*, recognized the potential loss to a former non-military spouse if the military spouse is permitted to unilaterally convert retirement benefits, including those distributed as property to the non-military spouse, to veterans' disability pay. 490 U.S. at 595. Justice O'Connor noted that "The harsh reality of this holding is that former spouses like Gail Mansell can, without their consent, be denied a fair share of their ex-spouse's military retirement pay simply because he elects to increase his after-tax income by converting a portion of that pay into disability benefits." Id. Justice O'Connor further states:

> The Former Spouse's Protection Act does not "positively require" States to abandon their own law concerning the divisibility upon divorce of military retirement pay waived in order to obtain veterans' disability benefits. On the contrary, the whole thrust of the Act was to restore to the States their traditional authority in the area of domestic relations. 490 U.S. at 597.

Contrary to the Petitioner's assertion, there has been no implication of the anti-attachment provision of the USFSPA in the enforcement relief afforded Mrs. Padot by the Florida Circuit Court. The applicable provision of the anti-attachment provision, codified at 38 U.S.C. 5301(a) (1), provides:

> Payments of benefits due or to become due under any law administered by the Secretary shall not be

> assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall e exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.

In the instant case the Florida Circuit Court, in recognition of *Mansell*, very specifically clarified that it was not ordering that Mr. Padot to utilize any portion of his disability benefits to comply with the effect of the property distribution and award of retirement benefits to Mrs. Padot. Even if Mr. Padot had been required to use his disability benefits to satisfy his obligation, given the intent of the anti-attachment provision, there would be no "major damage" to "clear and substantial federal interests." *Hisquierdo, supra*, 439 U.S. at 581.

In *Rose v. Rose*, 481 U.S. 619 (1989) this Court considered this anti-attachment provision in the context of a child support enforcement action. The Court noted that the legislative history was sparse but recognized that it served two purposes: "to 'avoid the possibility of the Veterans' Administration . . . being placed in the position of a collection agency' and to 'prevent the deprivation and depletion of the means of subsistence of veterans dependent upon these benefits as the main source of their income.' citing S. Rep. No. 94-1242, pp. 147 - 148(1976), U.S. Code Cong. & Admin.News 1976, pp. 5241, 5369, 5370). *Rose, supra*, at 631. It further noted that disability benefits ". . . are intended to 'provide reasonable and adequate compensation for disabled veterans *and their families*." (Emphasis in the original).

citing S.Rep. No. 98 - 604, p. 24 (1984), U.S.Code Cong. & Admin. News 1984, pp. 4479, 4488. As Justice O'Connor, with whom Justice Stevens joined in the concurring opinion wrote, "The plain intent of § 3101(a) is to protect the veteran *and* his family against the claims of creditors. It is not intended to protect the veteran against claims *by* his family." (Emphasis in the original).

There is nothing in the plain language of the anti-attachment provision which authorizes a veteran to utilize it as a means of depriving a former non-military spouse of his or her property interest which, but for the unilateral action of the veteran, would be secure.

The Florida state court acted within its established authority in the instant case and in no way contravened federal law. As recognized by the Florida Appellate Court, the Supplemental Order awarded Mrs. Padot a vested interest in Mr. Padot's military retirement benefits and provided that neither party was to take any action which would deprive the other of the [military benefits.] It further reserved jurisdiction to enforce Mrs. Padot's rights to her share of the benefits.

Contrary to the Petitioner's assertion, the Florida Circuit Court's enforcement of the divorce decree is not dependent on the inclusion of an indemnification provision. The Supplemental Order of 1995 clearly directed Mr. Padot to not take any action which would deprive Mrs. Padot of her interest in the military retirement benefits. This Order was never appealed by Mr. Padot and became a final order subject to the Florida state courts' inherent enforcement authority. The Florida Appellate Court determined that the Circuit Court properly exercised its enforcement authority, citing as support the cases of *Janovic v. Janovic*, 814 So.2d 1096, 1101 (Fla. 1st DCA

2002), and *Johnson v Johnson*, 37 S.W. 3d 892 (Tenn. 2001). The facts of *Janovic* are similar to those of the instant case. Mr. Janovic was still in the military when the parties divorced. Less than a year later he retired and waived a portion of his retirement pay to receive disability benefits. The appellate court held that the order requiring Mr. Janovic to indemnify his former wife for the reduction of her benefits did not violate *Mansell*. The court held that the lack of an indemnification provision in the parties' agreement was not fatal. *Janovic, supra, at 1101.*

Similar logic was applied in *Black v. Black*, 842 So.2d 1280 (Me. 2004). The parties' marital settlement agreement, which divided the husband's military retirement benefits, did not contain a "savings" or indemnification clause. The Court held that, " Enforcement relief is not, however, dependent on the existence of a savings clause or a covenant of good faith and fair dealing where, as here, a party's post judgment actions render the divorce judgment's distributive award a nullity." Id. at 1285. The Court further held that "The strong public policy favoring the finality of property distributions and nonmodifiable waivers of spousal support is not furthered here by the denial of enforcement. David's election of disability pay in lieu of retirement pay usurped the allocation of property ordered in the judgment, and it promoted the exact instability of requiring David to pay directly to Lorraine the amounts she would have received but for his action." Id. at 1286.

There is no specific directive or requirement in the USPSPA or *Mansell* which precludes state courts, such as the Florida state court in the instant case, from enforcing their own divorce decrees, when a retired military spouse unilaterally converts retirement benefits to disability benefits, post-judgment, thereby depriving a non-military spouse her vested

property interest in the retirement benefits. To allow a military spouse to convert the benefits, post-judgment, without requiring that the non-military spouse be made whole either with assets or other income of the military spouse, would render every military divorce unstable and a potential nullity.

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JANE HARLEY GROSSMAN
*Counsel of Record*
132 24th Avenue North
St. Petersburg, Florida 33704
Phone (727) 823-7600
*Counsel for Respondent*

(3)

No. 05-1076

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In The

# Supreme Court of the United States

KEVIN Y. PADOT,

*Petitioner,*

v.

BRENDA G. PADOT,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Second District Court Of Appeal Of Florida**

## REPLY TO BRIEF IN OPPOSITION

DAVID J. BEDERMAN
*Counsel of Record*
1301 Clifton Road
Atlanta, Georgia 30322-2770
(404) 727-6822

*Attorney for Petitioner*

## REPLY TO BRIEF IN OPPOSITION

In her Brief in Opposition ("Op. Cert."), Respondent essentially concedes the significance of the issues presented and the manifest division of authority among state courts in the construction of the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408, and Veterans' Benefits Act (VBA), 38 U.S.C. § 5301, prohibition of treating military disability pay as marital property divisible upon divorce. Respondent submits, instead, that the Florida appeals court decision was substantively correct on other grounds not implicating the Constitution's Supremacy Clause.

Without presaging the merits of the issues raised here (in the event that this Court, in the wise exercise of its discretion, grants review), Petitioner disputes the factual and legal premises of Respondent's contentions. This case remains an excellent vehicle for this Court to resolve the festering disputes implicating the interplay of federal and state law in the handling of military disability pay in divorce proceedings.

1. A consistent theme of Respondent's submission, see Op. Cert. 1, 6, 8-9, is that the preclusive effect of USFSPA, and this Court's decision in *Mansell v. Mansell*, 490 U.S. 581 (1989), is not present when a military member is still on active duty when divorced. In other words, Respondent suggests that when the "waiver of retirement benefits in lieu of disability pay occur[s] post-judgment," Op. Cert. 1, then federal law somehow does not apply.

This contention has no merit. Under controlling federal law, an entitlement to disability pay can only arise after separation or retirement from the military. See 38 U.S.C. § 1131, 5110(b). More importantly, USFSPA's prohibition on treating disability pay as a part of "disposable retired pay" for

purposes of division upon divorce, 10 U.S.C. § 1408(a)(4)(B), makes no distinction as to the timing of the divorce in relation to the date of retirement (and the receipt of either retired or disability pay). Lastly, there is nothing in the *Mansell* decision itself that would suggest that its holding is limited to situations where the servicemember has been drawing military disability pay prior to divorce, as opposed to cases where (as here) a divorce and property settlement occurs, a servicemember retires, and then later (by operation of federal law) the veteran waives a portion of retirement pay in favor of receiving disability pay.

Respondent relies on the Maine Supreme Judicial Court's holding in *Black v. Black*, 842 A.2d 1280 (Me. 2004), that USFSPA does not limit the authority of a state court to grant postjudgment relief when military retirement pay previously divided by a divorce judgment is converted to disability pay, so long as the relief awarded does not itself attempt to divide disability pay as marital property. As Petitioner has already noted, Pet. 17-18, the *Black* ruling has been contradicted by the highest courts of six other jurisdictions. See *Ex parte Billieck*, 777 So. 2d 105 (Ala. 2000); *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992); *Ashley* v. Ashley, 990 S.W.2d 507 (Ark. 1999); *Matter of the Marriage of Wherrell*, 58 P.3d 734 (Kan. 2002); *In re Strong*, 8 P.3d 763 (Mont. 2000) *Ryan v. Ryan*, 600 N.W.2d 739 (Neb. 1999).

2. Respondent suggests, Op. Cert. 1, 9, 10-11, that because Petitioner has other sources of income to offset the Florida court's order that he remit a portion of his disability pay, that somehow this removes this situation from the relevant provision of the VBA prohibiting an assignment of veterans' benefits. See 38 U.S.C. §§ 5301(a)(1); 5301(a)(3)(A). Respondent asserts that there has thus been "no 'major damage' to 'clear and substantial federal interests'." Id. at 11 (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979)).

But this Court's ruling in *Hisquierdo* expressly rejected the notion that the anti-attachment provisions of federal benefit statutory schemes (as with Railroad Retirement Act, at issue in that case) can be circumvented by the simple expedient of arguing that an offsetting award can be made against the former spouses' *other* assets. This Court held "[a]n offsetting award, however, would upset the statutory balance and impair petitioner's economic security just as surely as would a regular deduction from his benefit check. The harm might well be greater." 439 U.S. at 588. Respondent's contention, that this case does not factually implicate the VBA, has no merit.

3. Respondent also argues, Op. Cert. 7, 12-13, that there is some sort of "equitable" exception to this Court's ruling in *Mansell* and its application of USFSPA in prohibiting the allocation of military disability pay to the marital estate. Moreover, Respondent suggests, because Petitioner agreed to not "take any action which shall alter or otherwise reduce the interest of the other party in the . . . retired pay. . . ," Pet. App. 17a, Florida courts are somehow justified in equitably estopping him from taking military disability pay.

This, of course, begs the question presented by Petitioner, see Pet. (i), 11-13, whether this Court's decision in *Mansell*, see 490 U.S. at 586 n.5, properly read and understood, sanctions a wholesale "*res judicata*" or "equitable" exception to its holding. Respondent concedes, as she must, that there is no express indemnification provision in the marital property decree, and that no mention is made of allocating disability pay. See Pet. App. 7a-8a. These are factors that may have counseled against this Court granting review in similar cases, see *Shelton v. Shelton*, 78 P.3d 507 (Nev.), *cert. denied*, 541 U.S. 960 (2003); *Seddio v. Michaels*, 529 U.S. 1068 (2000) (denying review of an unreported Texas decision), but are not present here.

Respondent's reliance, Op. Cert. 8-9,12-13, on such cases as *Janovic v. Janovic*, 814 So. 2d 1096 (Fla. App. 2002), *Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001), and *Black*, 842 A.2d 1280 (Me. 2004), if anything, illustrates the level of incoherence in state court decisions construing *Mansell* and USFSPA's provision barring the use of disability pay as "disposable retired pay." These cases appear to stand for the proposition that state courts may freely ignore the strictures of federal law, so long as they are achieving an "equitable" result in enforcing marital property decrees. Moreover, these courts – along with Respondent, see Op. Cert. 7, 8 – appear to characterize the former spouse's receipt of future military retired pay as a "vested right," an interest that state courts can enforce even in the teeth of federal prohibitions. This flies in the face of the reality that veterans, like Petitioner, are not themselves "taking any action" to diminish their spouse's receipt of retired pay. This is being accomplished, rather, by operation of federal law. Respondent's attempt to foist a broad, equitable exception to the operation of federal law should be unavailing.

4. Finally, Respondent emphasizes, Op. Cert. 6-7, 10-11, the natural presumption against the federal preemption of state law in the context of domestic relations. Petitioner is mindful of the high bar set by such cases as *Hisquierdo*, 439 U.S. at 581, and *Rose v. Rose*, 481 U.S. 619, 625 (1987). Petitioner would submit that the clear terms of USFSPA and VBA qualify as a "positive require[ment] by direct enactment," preempting contrary state family law, and that state court refusals to comply with the prohibition against encumbering military disability pay constitutes "'major damage' to clear and substantial federal interests." Id.

Any doubts on this point have been settled by this Court's consistent jurisprudence that when Congress legislates uniform duties, immunities, and benefits for this nation's

military personnel, such reflect "substantial federal interests" which demand preemption of contrary state law. See *United States v. Shearer*, 473 U.S. 52, 58, n.4 (1985) (in discussing *Feres* doctrine, this Court concluded that "it would be anomalous for the Government's duty to supervise servicemen to depend on the local law of the various states"); *United States v. Standard Oil Co.*, 332 U.S. 301, 305-07 (1947). Even more pertinent is this Court's discussion in *McCarty v. McCarty*, 453 U.S. 210 (1981), where it was noted that "it is manifest that the application of community property principles to military retired pay threatens grave harm to 'clear and substantial' federal interests." Id. at 232. That was also the clear import of this Court's decision in *Mansell*.

By whatever standard of preemption this Court chooses to employ, Petitioner has raised a clear case of a substantial national interest being subverted by fractured and tortured state court interpretations of controlling federal statutes and decisional law.

## CONCLUSION

For the foregoing reasons, and those previously presented, the petition should be granted.

Respectfully submitted.

DAVID J. BEDERMAN
*Counsel of Record*
1301 Clifton Road
Atlanta, Georgia 30322-2770

*Attorney for Petitioner*

May 2006

Supreme Court, U.S.
FILED
NOV 2 0 2006
OFFICE OF THE CLERK

(4)

No. 05-1076

# In the Supreme Court of the United States

KEVIN Y. PADOT, PETITIONER

*v.*

BRENDA G. PADOT

*ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

PAUL D. CLEMENT
*Solicitor General*
*Counsel of Record*
PETER D. KEISLER
*Assistant Attorney General*
EDWIN S. KNEEDLER
*Deputy Solicitor General*
DAN HIMMELFARB
*Assistant to the Solicitor General*
MICHAEL S. RAAB
JOSHUA WALDMAN
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

PAUL J. HUTTER
*Acting General Counsel*
*Department of Veterans Affairs*
*Washington, D.C. 20420*

## QUESTIONS PRESENTED

When the parties divorced and their property was divided, petitioner agreed, and the trial court ordered, that respondent was entitled to 33.96% of petitioner's military retirement pay. Petitioner later waived a portion of his retirement pay in favor of veterans' disability benefits. The trial court ordered that respondent was entitled to 33.96% of what petitioner's retirement benefits would have been had there been no waiver. The questions presented are:

1. Whether the trial court's order violates the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. 1408 (2000 & Supp. IV 2004), which was interpreted in *Mansell* v. *Mansell*, 490 U.S. 581 (1989), to authorize the division of retirement pay but not the portion of retirement pay waived in favor of disability benefits.

2. Whether the trial court's order violates the anti-attachment provision applicable to disability benefits, 38 U.S.C. 5301(a)(1) (Supp. III 2003).

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# In the Supreme Court of the United States

No. 05-1076

KEVIN Y. PADOT, PETITIONER

*v.*

BRENDA G. PADOT

*ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition should be denied.

### STATEMENT

1. a. Members of the military services who have served for the requisite period may retire from active duty and receive retirement pay. 10 U.S.C. 3911 *et seq.* (Army); 10 U.S.C. 6321 *et seq.* (Navy and Marine Corps); 10 U.S.C. 8911 *et seq.* (Air Force). In addition, veterans who become partially or totally disabled as a result of military service may be eligible for disability benefits. 38 U.S.C. 1110 (wartime disability); 38 U.S.C. 1131 (peacetime disability). In general, however, a military retiree may receive disability benefits only to the extent that he or she waives a corresponding amount of re-

tirement pay. 38 U.S.C. 5305. Because disability benefits, unlike retirement pay, are exempt from taxation, 38 U.S.C. 5301(a), such waivers are common. See *Mansell* v. *Mansell*, 490 U.S. 581, 583-584 (1989).

b. In *McCarty* v. *McCarty*, 453 U.S. 210 (1981), this Court held that state courts are preempted by federal law from treating a service member's retirement pay as community property divisible between the service member and former spouse upon divorce. Congress responded to *McCarty* by enacting the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. 1408 (2000 & Supp. IV 2004), which, in its current form, authorizes a state court to treat "disposable retired pay" either "as property solely of the [former service] member or as property of the [former service] member and his spouse in accordance with the law of the jurisdiction of such court," 10 U.S.C. 1408(c)(1). "Disposable retired pay" is defined in the statute as "the total monthly retired pay to which a member is entitled," less certain amounts. 10 U.S.C. 1408(a)(4). Among the amounts to be "deducted from the retired pay" are those waived "to receive compensation under * * * title 38"—*i.e.*, amounts waived to receive disability benefits. 10 U.S.C. 1408(a)(4)(B).

In *Mansell*, *supra*, this Court construed the USFSPA to reject the *McCarty* rule, but only in part. The Court held that, under the statute's "plain and precise language," state courts "have been granted the authority to treat disposable retired pay as community property," but "have not been granted the authority to treat *total* retired pay as community property." 490 U.S. at 589 (emphasis added). Because the USFSPA excludes disability benefits from the definition of disposable retired pay, the Court concluded that state courts are preempted by federal law from treating as divisible property retirement pay waived in favor of disability benefits.

c. The veteran in *Mansell* argued that the state court's division of his total retired pay violated, not only the USFSPA, but also the anti-attachment provision applicable to veterans' disability benefits. Under that provision, 38 U.S.C. 5301(a)(1) (Supp. III 2003) (formerly 38 U.S.C. 3101(a) (1988)), disability benefits "shall not be assignable except to the extent specifically authorized by law, and * * * shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." In light of its holding that the USFSPA precludes the division of retirement pay waived in favor of disability benefits, however, the Court found it unnecessary in *Mansell* to address whether the anti-attachment provision would independently afford such protection. See 490 U.S. at 587 n.6.[1]

2. Petitioner entered the military in April 1980 and married respondent in September 1980. The parties were divorced in 1995. At the time of the final divorce judgment, petitioner was still on active duty. Pet. App. 2a, 16a.

The parties agreed to a division of "military retirement * * * pay," Pet. App. 2a, with respondent entitled to 33.96% of the payments, *id.* at 2a, 17a. The order incorporating the agreement provided that "[n]either party shall take any action which shall alter or otherwise reduce the interest of the other party in the * * * retired pay." *Ibid.*

Petitioner retired from active military duty in May 2000 and began receiving retirement pay in June 2000. He applied for disability benefits and was subsequently found to be 30% disabled. In December 2000, petitioner waived a portion of

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[1] In *Rose* v. *Rose*, 481 U.S. 619 (1987), the Court addressed the applicability of the anti-attachment provision to child support, holding that the provision "does not extend to protect a veteran's disability benefits from seizure where the veteran invokes that provision to avoid an otherwise valid order of child support." *Id.* at 634.

his retirement pay in favor of disability benefits. Approximately four months later, petitioner began working for the federal government as a civilian air-traffic controller. Pet. App. 2a-3a, 16a-17a.

In July 2002, respondent filed a "Motion to Enforce Final Judgment" in the Circuit Court for Pinellas County, Florida. She argued, among other things, that petitioner's waiver of a portion of his retirement pay in order to obtain disability benefits operated to reduce the amount she would receive under the final divorce judgment. Pet. App. 3a, 16a.

3. The Circuit Court ruled that, by reducing respondent's share of his retirement pay, petitioner violated the final divorce judgment. Pet. App. 16a-20a. The court reasoned that the "overall plan" of the judgment was that "the former wife's share of the military retirement would stand in the place of alimony," and that petitioner's waiver of retirement pay "altered" that plan and violated the judgment's prohibition on taking any action that altered or reduced respondent's interest in the retirement pay. *Id.* at 18a. The court found that result particularly "inequitable" because petitioner was receiving additional income from his job as an air-traffic controller. *Id.* at 18a-19a. In so holding, the court noted that, in *Abernethy* v. *Fishkin*, 699 So. 2d 235 (1997), the Florida Supreme Court had found that trial courts "are not powerless to enforce the original agreement so long as no funds from the disability pool are drawn upon to fulfill the obligations of the former husband to the former wife." Pet. App. 19a. The Circuit Court therefore ordered petitioner to pay respondent 33.96% of "the amount that the former spouse's military retirement would have been absent his voluntary reduction of those retirement dollars in favor of disability payments," but

specifically directed that no portion of petitioner's disability benefits be used to satisfy that obligation. *Id.* at 19a-20a.[2]

4. The Second District Court of Appeal of Florida affirmed in relevant part. Pet. App. 1a-14a.

Rejecting petitioner's contention that the "principles of federal preemption" in *Mansell* "prohibit[ed] the result ordered by the trial court," the appellate court found *Mansell* "materially distinguishable from * * * the present case." Pet. App. 4a-5a. The court explained that, unlike in *Mansell*, the parties in this case agreed that respondent was entitled to a percentage of petitioner's retirement pay and were ordered not to "take any action to reduce the other party's interest in the * * * retire[ment] pay." *Id.* at 5a. The court also explained that, unlike in *Mansell*, petitioner's remaining retirement pay and civilian income would enable him to comply with his obligations under the divorce judgment and that his disability benefits were shielded from respondent by the trial court. *Id.* at 5a-6a.

The District Court of Appeal also rejected petitioner's contention that the Florida Supreme Court's decision in *Abernethy* was distinguishable because the agreement in that case, but not in this one, explicitly required indemnification in the event that either party took an action that defeated the other party's right to receive a portion of the retirement pay. Pet. App. 7a-9a. The court explained that the order at issue here prohibited any action that would reduce the other party's interest in the retirement pay and that, although the order "does not specifically state that the Former Husband must

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[2] In a subsequent order, Pet. App. 21a-23a, the Circuit Court denied petitioner's motion for rehearing on a number of issues, including "the military pay question," *id.* at 22a, but modified its earlier decision to provide that petitioner's obligations to respondent be retroactive to the initial date of petitioner's employment as an air-traffic controller rather than the date of his retirement from active military service, *ibid.*

indemnify the Former Wife if he takes action that reduces her interest," the order "gives the [trial] court continuing jurisdiction 'to enforce the former spouse's rights to her share of the * * * benefits.'" *Id.* at 8a.

In concluding its opinion, the District Court of Appeal stated that "the Former Wife obtained a vested interest in a percentage of the Former Husband's military retirement * * * pay * * * when the trial court entered the * * * [o]rder" dividing property, and that, "when years later the Former Husband took the voluntary action of waiving [retirement] pay in order to receive disability benefits, the Former Wife's vested interest in his military retirement * * * pay was reduced." Pet. App. 9a. The court therefore "f[ou]nd no error" in the trial court's ruling that petitioner must "make whole the retirement benefits contemplated in the Final Judgment in favor of the former wife." *Ibid.*[3]

5. The Supreme Court of Florida denied petitioner's petition for review. Pet. App. 15a.

## DISCUSSION

Petitioner contends (Pet. 10-25) that the Circuit Court's order, which required him to pay respondent an amount equal to the percentage of what his retirement pay would have been had he not waived a portion of that pay in favor of disability benefits after the final divorce judgment was entered, violates both the USFSPA as interpreted in *Mansell* and the anti-at-

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[3] In the same opinion, the District Court of Appeal reversed the trial court's decision insofar as it provided for payment by "income deduction order" (because Florida law limits the use of such an order to alimony or child support), Pet. App. 9a-10a; vacated a "clarification order" concerning retroactivity (because the order was not authorized by Florida's procedural rules), *id.* at 10a-12a; and reversed another order issued by the trial court insofar as it required petitioner to cooperate with respondent in obtaining and paying for a portion of a replacement survivor benefit plan, *id.* at 12a-13a. Those aspects of the appellate court's decision are not at issue here.

tachment provision applicable to disability benefits. Petitioner's USFSPA claim was correctly rejected by the District Court of Appeal, and its decision does not conflict with any decision of any state court of last resort. Petitioner's anti-attachment claim was not pressed or passed upon below, is in any event without merit, and has been uniformly rejected by state courts of last resort. The petition for a writ of certiorari should therefore be denied.[4]

**A. Certiorari Is Not Warranted On The Question Whether The Trial Court's Order Violates The USFSPA As Interpreted In *Mansell***

**1. The decision below does not conflict with the decision of any state court of last resort**

a. The District Court of Appeal approved the Circuit Court's order, and held that it did not conflict with *Mansell*, because petitioner had agreed, and the Circuit Court had directed, that he would pay respondent a percentage of his retirement pay and take no action to reduce respondent's interest in it. Pet. App. 4a-9a. The District Court of Appeal relied, in part, see *id.* at 6a-8a, on the Supreme Court of Florida's decision in *Abernethy* v. *Fishkin*, 699 So. 2d 235 (1997). That case held that, "while federal law prohibits the division of disability benefits," it "does not prohibit spouses from entering into a property settlement agreement that awards the non-military spouse a set portion of the military spouse's retirement pay" and includes an "indemnification provision[] ensuring such payments." *Id.* at 240.

The highest courts of at least six other States—Maine, Massachusetts, Nevada, Rhode Island, South Dakota, and

[4] This Court has previously denied certiorari in a case presenting the same USFSPA claim that is presented here, see *Seddio* v. *Michaels*, 529 U.S. 1068 (2000), and in a case presenting the same USFSPA and anti-attachment claims that are presented here, see *Shelton* v. *Shelton*, 541 U.S. 960 (2004).

Tennessee—have approved orders similar to the one entered by the Circuit Court on the basis of a contract-law theory similar to the one on which the District Court of Appeal relied.[5] And, as far as we are aware, no state court of last resort has rejected such a theory. There is therefore no conflict on that issue.

The highest courts of at least seven other States—Alaska, Arkansas, Nebraska, Mississippi, Montana, North Dakota, and Washington—have approved relief of the type at issue

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[5] See *Hisgen* v. *Hisgen*, 554 N.W.2d 494, 498 (S.D. 1996) (*Mansell* "does not preclude state courts from interpreting divorce settlements to allow a spouse to receive property or money equivalent to [the agreed-upon percentage of] a veteran's retirement entitlement[s]" if the veteran subsequently waives a portion of the entitlements in favor of disability pay.); *Johnson* v. *Johnson*, 37 S.W.3d 892, 897-898 (Tenn. 2001) ("[W]hen a[] [marital dissolution agreement] divides military retirement benefits, the non-military spouse has a vested interest in his or her portion of those benefits as of the date of the court's decree. * * * [A]n act of the military spouse [that unilaterally diminishes the vested interest] * * * constitutes an impermissible modification of a division of marital property and a violation of the court decree incorporating the [marital dissolution agreement].") (footnote omitted); *Krapf* v. *Krapf*, 786 N.E.2d 318, 326 (Mass. 2003) ("The judgment in this case does not divide the defendant's * * * disability benefits in contravention of the *Mansell* decision; the judgment merely enforced the defendant's contractual obligation to his former wife, which he may satisfy from any of his resources."); *Shelton* v. *Shelton*, 78 P.3d 507, 509 (Nev. 2003) ("Although states cannot divide disability payments as community property, states are not preempted * * * from enforcing contracts [that divide retirement benefits] * * *, even when disability pay is involved."), cert. denied, 541 U.S. 960 (2004); *Black* v. *Black*, 842 A.2d 1280, 1285 (Me. 2004) ("the USFSPA does not limit the authority of a state court to grant post-judgment relief when military retirement pay previously divided by a divorce judgment is converted to disability pay"); *Resare* v. *Resare*, 908 A.2d 1006, 1010 (R.I. 2006) ("[T]he Family Court did not in any way divide [the veteran's] *disability* benefit in contravention of *Mansell*, but simply held [him] to the terms of the original [property settlement agreement] and ordered payment of an amount calculated in accordance with the agreed upon [property settlement agreement].").

here, and found it consistent with *Mansell*, on a different theory. Those courts have held that, in making an equitable distribution of property or an award of alimony, trial courts may consider the economic consequences of the veteran's waiver of retirement pay in favor of disability benefits and rely upon them as a basis for increasing the former spouse's share of the remaining property or the size of the alimony award.[6] The highest court of one state—Alabama—has rejected this theory. In *Ex parte Billeck*, 777 So. 2d 105 (2000), the Supreme

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[6] See *Womack* v. *Womack*, 818 S.W.2d 958, 959 (Ark. 1991) (trial court may "t[ake] note of the disability benefits" in making an award of alimony); *Clauson* v. *Clauson*, 831 P.2d 1257, 1264 (Alaska 1992) ("federal law does not preclude our courts from considering, when equitably allocating property upon divorce, the economic consequences of a decision to waive military retirement pay in order to receive disability pay"); *In re Marriage of Kraft*, 832 P.2d 871, 875 (Wash. 1992) ("when making property distributions or awarding spousal support in a dissolution proceeding, * * * the court may consider the [disability] pay as a basis for awarding the nonretiree spouse a proportionately larger share of the community property where equity so requires"); *Vitko* v. *Vitko*, 524 N.W.2d 102, 104 (N.D. 1994) (trial court may "consider[] the disability income 'so as to determine the financial circumstances of each party to the divorce'"); *Kramer* v. *Kramer*, 567 N.W.2d 100, 113 (Neb. 1997) (trial court "may consider [disability] benefits and the corresponding waiver of retirement pension benefits" in "determining whether there has been a material change in circumstances which would justify modification of an alimony award to a former spouse who was previously awarded a fixed percentage of the retirement pension benefits"); *In re Marriage of Strong*, 8 P.3d 763, 769 (Mont. 2000) ("a [trial] court may consider * * * disability benefits in the same way it considers each party's ability to earn income post-dissolution as an important factor in achieving an equitable property division"); *Steiner* v. *Steiner*, 788 So. 2d 771, 779 (Miss. 2001) ("Military disability benefits were properly considered by the chancellor in the award of alimony."). Unlike the contract-law theory, this theory is an available ground for decision not only when the waiver of retirement pay postdates the divorce decree and the trial court is ruling on a request for enforcement or modification, but also when the waiver *predates* the divorce decree and the court is making an initial property distribution or alimony award.

Court of Alabama held that, "[w]hen a trial court makes an alimony award based upon its consideration of the amount of veteran's disability benefits," the trial court "essentially is awarding the wife a portion of those veteran's disability benefits[,] and in doing so * * * is violating federal law." *Id.* at 109.

There thus does appear to be a conflict on whether federal law permits a divorce court to consider a veteran's waiver of retirement benefits in making an equitable distribution of property or award of alimony. That question is not presented in this case, however, because the court below did not address it. Instead, consistent with the Florida Supreme Court's decision in *Abernethy*, the District Court of Appeal relied on a contract-law theory in affirming the order challenged by petitioner. Indeed, the Supreme Court of Alabama distinguished *Abernethy* on the ground that the agreement incorporated into the divorce judgment in *Billeck*, unlike the one in *Abernethy*, did not contain a provision that "protect[ed] the monthly sum the wife would receive should the husband's military retirement benefits be reduced." 777 So. 2d at 109. Insofar as it was suggesting that *Billeck* would have been decided differently if the agreement *had* contained such a provision, therefore, the Supreme Court of Alabama appears to agree with the rationale for the decision below (and with the uniform view of the state courts of last resort to consider the question)—namely, that a veteran can be contractually bound not to take action that reduces the former spouse's share of retirement benefits.[7]

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[7] At least three of the courts that allow consideration of a veteran's waiver of retirement benefits in distributing property or awarding alimony do so on the condition that the increase in the amount of property or alimony awarded to the former spouse not simply match dollar for dollar the amount of retirement pay waived by the veteran, but instead be based on an overall assessment of what is just and reasonable. See *Clauson*, 831 P.2d at 1264;

b. Petitioner contends that "at least six state supreme courts (Alabama, Alaska, Arkansas, Kansas, Montana, and Nebraska) * * * have taken diametrically the opposite position of that held below by Florida's courts." Pet. 18; accord Reply Br. 2. That is not correct.

As explained above, see pp. 9-10, *supra*, the theory rejected in the Alabama decision cited by petitioner, *Billeck*, *supra*, is one on which the decision below did not rely. And the Alabama decision arguably *endorses* the theory on which the decision below *did* rely.

The Alaska and Montana decisions cited by petitioner, *Clauson* v. *Clauson*, 831 P.2d 1257 (Alaska 1992), and *In re Marriage of Strong*, 8 P.3d 763 (Mont. 2000), did not address the contract-law theory on which the decision below relied. And, as noted above, see note 6, *supra*, they held that relief of the type at issue here *is* available—albeit on the theory that courts may consider the economic consequences of a veteran's waiver of retirement payments in making an equitable distribution of property. The Arkansas decision cited by petitioner, *Ashley* v. *Ashley*, 990 S.W.2d 507 (1999), likewise did not address the contract-law theory, and it likewise recognized that, when a veteran waives retirement payments in favor of disability benefits, the trial court may order "an increase in alimony." *Id.* at 509 (citing *Womack* v. *Womack*, 818 S.W.2d 958, 959 (Ark. 1991)). Moreover, a subsequent decision of the Court of Appeals of Arkansas *did* adopt the contract-law theory, and, in doing so, explicitly stated that *Ashley* did not

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*Kraft*, 832 P.2d at 875-876, 877; *Strong*, 8 P.3d at 769. It is not clear whether that is the rule in other jurisdictions. Even if it is not, however, this case is not a suitable one for resolving any conflict that may exist on the issue, because the court below did not address the question whether a waiver of retirement benefits may be considered in making an equitable distribution of property, and thus necessarily did not address the subsidiary issue of dollar-for-dollar matches.

foreclose its adoption. *Surratt* v. *Surratt*, 148 S.W.3d 761, 766 (2004).

As for the Kansas and Nebraska decisions cited by petitioner, neither *In re Marriage of Wherrell*, 58 P.3d 734 (Kan. 2002), nor *Ryan* v. *Ryan*, 600 N.W.2d 739 (Neb. 1999), addressed whether relief of the type at issue here is available under either of the theories described above. *Wherrell* addressed the distinct question whether a particular payment to the veteran was "divisible retirement or indivisible military disability." 58 P.3d at 736. And *Ryan* held that "th[e] portion of the [divorce] decree purporting to divide [the veteran's] disability income" was "void for v ant of jurisdiction," because "federal law precludes a state court, in a dissolution proceeding, from exercising subject matter jurisdiction over * * * disability benefits." 600 N.W.2d at 745. As noted above, moreover, see note 6, *supra*, a prior decision of the Supreme Court of Nebraska, *Kramer* v. *Kramer*, 567 N.W.2d 100 (1997), held that relief of the type at issue here *is* available, on the theory that courts may consider the consequences of a waiver of retirement payments in making an award of alimony. Any tension between the "jurisdictional" approach of *Ryan* and the decision in *Kramer* should be resolved by the Nebraska courts.

Petitioner also contends that the principle applied by the court below has been rejected by "the intermediate courts of appeals of an additional four jurisdictions (Louisiana, North Carolina, Texas, and Virginia)." Pet. 18. That contention would not support certiorari even if it were true, because this Court ordinarily grants certiorari in state cases only to resolve a conflict between "state court[s] of last resort" (or between a state court of last resort and a federal court of appeals). Sup. Ct. R. 10(b). In any event, there is no such conflict.

The Louisiana decision cited by petitioner, *Wright* v. *Wright*, 594 So. 2d 1139 (Ct. App. 1992), applied the principle that was applied in the decision below, but simply found that there was no breach of the agreement in that case. *Id.* at 1142. The same court applied the same principle in a subsequent decision and came to the opposite conclusion on the facts of that case. See *Poullard* v. *Poullard*, 780 So. 2d 498, 500 (La. Ct. App.) ("We agree with the trial court that 'the redesignation of pay cannot defeat the prior agreement of the parties.'"), writ denied, 790 So. 2d 641 (La. 2001). Similarly, the unpublished Virginia decision cited by petitioner, *Keough* v. *Keough*, No. 2140-96-4, 1997 WL 242559 (Ct. App. May 13, 1997), held that the veteran's former spouse was not entitled to a portion of his disability payments because the particular agreement in that case "unambiguously require[d] a reduction of the gross retirement pay by the disability payments received." *Id.* at *2. In published decisions issued both before and after *Keough*, the same court held, consistent with the decision below, that "parties may use a property settlement agreement to guarantee a certain level of income by providing for alternative payments" to compensate for a waiver of retirement pay. *McLellan* v. *McLellan*, 533 S.E.2d 635, 638 (Va. Ct. App. 2000); *Owen* v. *Owen*, 419 S.E.2d 267, 269 (Va. Ct. App. 1992).

The North Carolina decision cited by petitioner, *Halstead* v. *Halstead*, 596 S.E.2d 353 (Ct. App. 2004), did not address the theory on which the decision below relied. And it explicitly endorsed the other theory on which relief of the type at issue here has been approved: that "federal law d[oes] not preclude the consideration of the economic consequences of a decision to waive military retirement pay in order to receive disability pay in determining the equitable distribution of marital assets." *Id.* at 356.

As for the Texas decisions cited by petitioner, neither *In re Marriage of Reinauer*, 946 S.W.2d 853 (App. 1997), nor *Loria* v. *Loria*, 189 S.W.3d 797 (App. 2006), addressed whether relief of the type at issue here is available under either theory.

**2. The decision below is correct**

*Mansell* held that the USFSPA prohibits state courts from "treat[ing] as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." 490 U.S. at 595. It does not follow from that holding, however, that the USFSPA prohibits state courts from interpreting settlement agreements that divide retirement pay to require the veteran to make the former spouse whole if the veteran takes an action that reduces the former spouse's proportion of the pay. Indeed, in at least two respects, the principle applied by the court below not only is consistent with *Mansell*, but finds affirmative support in it.

First, the Court recognized in *Mansell* that "domestic relations are preeminently matters of state law," that Congress "rarely intends to displace state authority in this area" when it passes general legislation, and that this Court therefore "will not find pre-emption absent evidence that it is 'positively required by direct enactment.'" 490 U.S. at 587 (quoting *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 581 (1979), in turn quoting *Wetmore* v. *Markoe*, 196 U.S. 68, 77 (1904)). The Court concluded that *Mansell* "present[ed] one of those rare instances where Congress has directly and specifically legislated in the area of domestic relations," *ibid.*, because, in "plain and precise language," the USFSPA provides that a state may treat "disposable retired * * * pay" as divisible property and "specifically defines" that term to exclude retirement pay waived in favor of disability benefits, *id.* at 588-589 (quoting 10 U.S.C. 1408(a)(4)(B) and (c)(1) (1988)). In

contrast, the USFSPA does not "directly and specifically" address the interpretation and enforcement of property-settlement agreements that guarantee the former spouse a fixed proportion of retirement pay. Indeed, the statute does not address that subject at all.

Second, the property-settlement agreement incorporated into the divorce decree in *Mansell* divided the total amount of the veteran's retirement pay, including the amount he had waived in favor of disability benefits, and the veteran requested modification of the decree to remove the provision requiring him to share the waived portion of his retirement pay. 490 U.S. at 585-586 & n.5. In this Court, the former wife argued that "the doctrine of res judicata should have prevented this pre-*McCarty* property settlement from being reopened," but the Court held that "[w]hether the doctrine of res judicata, as applied in California, should have barred the reopening of pre-*McCarty* settlements is a matter of state law over which we have no jurisdiction." *Id.* at 586 n.5. On remand, the state appellate court ruled against the veteran on the ground that state law precluded the reopening of the settlement agreement, *In re Marriage of Mansell*, 265 Cal. Rptr. 227 (Ct. App. 1989), and this Court denied certiorari, 498 U.S. 806 (1990). So, too, the question whether a particular settlement agreement obligates a veteran to make his or her former spouse whole in the event that the veteran subsequently waives retirement pay in favor of disability benefits is a matter of state contract law that—like the state law of judgments—is not preempted by the USFSPA. Indeed, insofar as the USFSPA's preemptive effect is concerned, there is little difference between a state-law rule prohibiting a veteran from challenging a divorce decree that divides disability benefits if he agreed to the division when the decree was entered (the rule at issue on remand in *Mansell*) and a state-law rule prohibiting a veteran from reducing a former spouse's share of

retirement benefits if he agreed not to take any action that would have that effect (the rule at issue here).

Petitioner places considerable emphasis (Pet. i, 7-10, 12-13, 15-16 & n.6, 21; Reply Br. 3) on the fact that there is no express indemnification provision in the settlement agreement. As the court below explained, however, the order incorporating the agreement prohibited petitioner from taking any action that would reduce respondent's interest in the retirement pay and gave the trial court continuing jurisdiction "to enforce [respondent's] rights to her share of the * * * benefits." Pet. App. 8a. Adjusting petitioner's payment obligations to make respondent whole for such a reduction in retirement pay would appear to be a legitimate enforcement mechanism. In any event, the question of what specific language is necessary to give a party an enforceable right under a contract or a court order incorporating a contract is one of state law, and any disagreement that may exist among state courts on that question is therefore not a basis for certiorari.[8]

### B. Certiorari Is Not Warranted On The Question Whether The Trial Court's Order Violates The Anti-Attachment Provision Applicable To Veterans' Benefits

Petitioner invokes this Court's jurisdiction (Pet. 1) under 28 U.S.C. 1257(a). Under that statute, "this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that ren-

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[8] This case does not present the quite different question whether a state court could enter an injunction or other order barring a veteran from waiving a portion of his retirement pay so as to receive tax-free disability benefits. This case, and the other cases discussed in this brief, concern only the consequences of such a waiver when the veteran has made a contractual commitment, embodied in a court decree, to provide the spouse with a certain level of alimony or division of property.

dered the decision [the Court has] been asked to review.'" *Howell* v. *Mississippi*, 543 U.S. 440, 443 (2005) (per curiam) (quoting *Adams* v. *Robertson*, 520 U.S. 83, 86 (1997) (per curiam)). Petitioner's contention that the Circuit Court's order violates the anti-attachment provision applicable to veterans' benefits, 38 U.S.C. 5301(a)(1) (Supp. III 2003), was not addressed by the District Court of Appeal. See Pet. App. 3a-10a. When a state court "is silent on a federal question," this Court "assume[s] that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption." *Adams*, 520 U.S. at 86-87 (citation omitted). Petitioner makes no attempt to discharge that burden, and it appears that any such attempt would be unsuccessful.[9] That is a sufficient basis for denying certiorari on the second question in the petition.[10]

In any event, the anti-attachment provision affords petitioner no basis for relief. Under that provision, it is only "[p]ayments of benefits due or to become due under any law administered by the Secretary [of Veterans Affairs]" (which

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[9] An anti-attachment claim was not raised either in petitioner's initial brief or in his reply brief in the District Court of Appeal. See Pet. Dist. C.A. Br. 13-26; Pet. Dist. C.A. Reply Br. 3-7. And although petitioner's motion for rehearing in that court quoted a subparagraph of 38 U.S.C. 5301, see Pet. Mot. For Reh'g 7 (quoting Section 5301(a)(3)(A)), it did not quote the anti-attachment provision (Section 5301(a)(1)). Moreover, this Court has "generally refused to consider issues raised * * * for the first time in a petition for rehearing when the state court is silent on the question." *Adams*, 520 U.S. at 89 n.3.

[10] Since the court below did not cite or mention—much less discuss—the anti-attachment provision, it is hard to know what petitioner means when he says that the court was "clearly cognizant" of it. Pet. 24. In any event, it is not enough that a lower court be "cognizant" of the statutory provision on which the petitioner is relying in this Court; the actual legal claim that is based on the provision must have been pressed by the petitioner or passed upon by the lower court.

include disability benefits) that are non-assignable, exempt from the claim of creditors, and not liable to attachment, levy, or seizure. 38 U.S.C. 5301(a)(1) (Supp. III 2003). Whatever applicability that provision might have in a case in which the veteran is ordered to pay the former spouse a portion of his disability benefits, this is not such a case. Petitioner is receiving civilian income and retirement pay in addition to disability benefits, and the trial court's order explicitly provides that nothing in its order "should be read to require the former husband to pay any portion of his disability * * * income * * * over to the former wife" and that "no portion of that pool of funds in whatever amount that pool may be from time to time [may] be payable over to the former wife." Pet. App. 19a. Far from having violated the anti-attachment provision, the trial court took pains to comply with it.

Nor is there any conflict among state courts of last resort on the second question in the petition. Some of the decisions that reject the contention that relief of the type at issue here violates the USFSPA as interpreted in *Mansell* also reject the contention that such relief violates the anti-attachment provision applicable to veterans' benefits. See *Krapf*, 786 N.E.2d at 326 n.12 (contract-law theory); *Clauson*, 831 P.2d at 1263 & n.9 (theory that disability payments may be considered in dividing property); *Strong*, 8 P.3d at 769-771 (same). But petitioner cites no decision of any state court of last resort that has reached a contrary conclusion, and we are not aware of any.[11]

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[11] Under Section 641 of the National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1511 (codified primarily at 10 U.S.C. 1414 (Supp. IV 2004)), which is being phased in over ten years, a service member who did not retire based on a determination of medical unfitness and is at least 50% disabled will be entitled to receive both retirement pay and disability benefits without waiving any portion of the retirement pay. We are informed by the Department of Defense that those who benefit from that law

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
*Solicitor General*

PETER D. KEISLER
*Assistant Attorney General*

EDWIN S. KNEEDLER
*Deputy Solicitor General*

DAN HIMMELFARB
*Assistant to the Solicitor General*

PAUL J. HUTTER
*Acting General Counsel*
*Department of Veterans Affairs*

MICHAEL S. RAAB
JOSHUA WALDMAN
*Attorneys*

NOVEMBER 2006

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constitute approximately one fourth of the total number of service members who are eligible for both retirement pay and disability benefits. Accordingly, while the law is likely to cause a decrease in the number of cases in which the retirement pay divided upon divorce is later reduced as a result of the veteran's receipt of disability benefits, and thus in the number of cases in which the questions presented here may arise, such cases will not be eliminated entirely.